Grand Canyon Education, Inc. d/b/a Grand Canyon University *and* Edmond Bardwell *and* John Young, III *and* Shelly Campbell *and* Gloria Johnson. Cases 28–CA–022938, 28–CA–023035, 28–CA–023038, 28–CA–023239, and 28–CA–023336

July 12, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

On October 21, 2011, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply brief. The Respondent filed cross-exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order. We have also modified the judge's recommended Order and notice, as set forth in full below.[3]

1. We adopt the judge's findings that the Respondent lawfully discharged Charging Parties Shelly Campbell and Edmond Bardwell but that its discharge of Charging Party Gloria Johnson violated Section 8(a)(1) of the Act. In agreeing with the judge, we note that under *Wright Line*,[4] the General Counsel establishes unlawful motivation by showing that (1) the employee engaged in protected concerted activity, (2) the employer knew of the activity, and (3) the employer had animus toward the activity. *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 (2011).[5] If the General Counsel satisfies this burden, the employer may overcome it by proving that it would have taken the action even in the absence of the employee's protected concerted activity. Id.

As found by the judge, the Acting General Counsel demonstrated that Campbell, Bardwell, and Johnson actively engaged in protected concerted activity and that the Respondent was well aware of their activity. The three employees were employed as enrollment counselors on the Respondent's "grad team," with responsibility for pursuing leads on potential students in order to enroll them in the Respondent's graduate programs in Christian studies or criminal justice. They frequently discussed with their coworkers, and expressed in team meetings with management, their shared concerns about the quality of the leads referred to them, the limited degree programs in which they were permitted to enroll students, and the consequent difficulty of meeting established enrollment quotas.

Although not specifically addressed by the judge, we further find that the Acting General Counsel satisfied his burden of showing animus against the employees' protected concerted activity. The Respondent committed numerous violations of Section 8(a)(1), including, among others: threatening employees with discharge because

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We adopt the judge's finding that the statements by College of Business and Liberal Arts Assistant Vice President Chanelle Ison to Charging Party Bardwell that the grad team was "opinionated" and "a hard case" and that Bardwell's remarks in an employee meeting were disrespectful did not constitute an implied threat of unspecified reprisal. In dismissing this allegation, we find it unnecessary to rely on the judge's discussion about Ison's intent or whether she bore animosity toward grad team members based on their protected concerted activities.

[2] No exceptions were filed to the judge's dismissal of complaint allegations that the Respondent violated Sec. 8(a)(1) by promulgating unlawful rules to and threatening employee John Young and by maintaining its written Electronic Communications Policy (ECP). Nor were exceptions filed to the judge's findings that the Respondent violated Sec. 8(a)(1) by Supervisor Ellen Rosa's interrogation of employees Johnson and Bardwell about an email critical of the Respondent, orally promulgating to them and other grad team employees a rule prohibiting employees from discussing their terms and conditions of employment, and threatening them and other grad team employees with discharge; by including an overbroad confidentiality requirement on its Employee Counseling Statement prohibiting employees from discussing their counseling sessions with other persons; and by Human Resources Business Partner Rhonda Pigati's orally promulgating an overly broad and discriminatory rule admonishing employees not to discuss their meetings with management with anyone else.

[3] We modify the Order to conform to the violations found and the Board's standard remedial language and in accordance with our recent decision in *Latino Express, Inc.,* 359 NLRB No. 44 (2012). We have substituted a new notice to conform to our modifications.

[4] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[5] The judge's statement of the *Wright Line* test was unclear as to whether the General Counsel must also show a nexus between the employee's protected concerted activity and the adverse employment action. The Board has clarified, however, that the initial burden does not include a "nexus" element. *Mesker Door*, supra at 2 fn. 5; see also *The TM Group*, 357 NLRB No. 98, slip op. at 1 fn. 2 (2011) (clarifying initial burden's elements in analysis of protected concerted activity).

they engaged in protected concerted activity; maintaining on its Employee Counseling Statement and orally affirming to Campbell a rule prohibiting employees from communicating with others about terms and conditions of employment, including counseling meetings;[6] disparately enforcing its Electronic Communications Policy (ECP) against Campbell;[7] and interrogating employees about their protected concerted activity. All of these actions interfere with employees' Section 7 rights and evidence the Respondent's hostility toward the exercise of those rights.

Nevertheless, as the judge found, the Respondent has shown that it would have terminated Campbell[8] and Bardwell[9] even in the absence of their protected concerted activity, but has failed to make this showing with respect to Johnson.[10] Accordingly, we adopt the judge's dismissal of the complaint allegations concerning the discharges of Campbell and Bardwell and his finding that the Respondent unlawfully discharged Johnson.

2. The Acting General Counsel excepts to the judge's finding that the Respondent did not violate Section 8(a)(1) by Pigati's June 2010 interrogation of employees. We find merit in the exception.

After hearing complaints from the grad team enrollment counselors, Pigati held one-on-one meetings with team members in her office.[11] Pigati did not inform the employees of the purpose of the meeting, that their participation was voluntary, or that there would be no reprisals for refusing to cooperate. She asked each employee a standard set of questions seeking an evaluation of Supervisor Rosa and her leadership abilities, as well as an assessment of team morale.

In her interview with Johnson, Pigati said that she "was meeting with everyone on the team and that whatever we talked about in that office, to keep it confidential." Pigati subsequently asked Johnson what she thought about Rosa as a manager. Johnson replied that Rosa was trying her best but had not been given "a fair chance" to learn how to be a manager. She further volunteered that some employees had complained about Rosa's managerial style. Pigati asked who those employees were, and Johnson named three employees. Pigati typed Johnson's answers into her computer and, as Johnson was leaving, repeated to her, "[J]ust keep this, you know, don't talk to anybody else on the team." The judge found that Pigati's statements to Johnson not to discuss their conversation with other employees violated Section 8(a)(1) as the oral promulgation of an overbroad and discriminatory rule against employees discussing terms and conditions of employment. As already noted (see fn. 2, supra), no exceptions were filed to that finding.

The judge also found, however, that Pigati's questioning of Johnson was not an unlawful interrogation under *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). He reasoned that, although Pigati did not state the purpose of the interrogation, it should have been readily obvious to Johnson that its purpose was to find out how Rosa was doing as a supervisor, and that Johnson voluntarily mentioned that other employees had complained about Rosa even before Pigati asked for the employees' names. The judge further relied on Johnson's testimony that she did not feel uneasy, frightened,

[6] We agree with the judge that the December 16, 2009 statements by Senior Vice President of Operations Sarah Boeder and Enrollment Counselor Manager Helen Schnell to Campbell that she was not to discuss their counseling meeting with anyone violated Sec. 8(a)(1). However, we find that the statements constituted an oral affirmation of the Respondent's existing written rule, which was found unlawful with no exceptions, rather than the promulgation of a new rule. See *Flamingo Las Vegas Operating Co.*, 359 NLRB No. 98, slip op. at 2 fn. 4 (2013); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776 (2006). Because no exceptions were filed to the judge's findings that similar statements by Rosa and Pigati were oral promulgations of unlawful rules, we find it unnecessary to pass on whether those statements involved new rules under the above precedent.

[7] The Acting General Counsel contends that the Respondent's exceptions and brief fail to specify, as required by Sec. 102.46(b)(1) of the Board's Rules and Regulations, how the judge erred in finding that the Respondent's enforcement of the ECP as to Campbell violated Sec. 8(a)(1). We agree. In the absence of an argument supporting this exception, we shall disregard it. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

[8] We have found that the Respondent's disparate enforcement of the ECP against Campbell was unlawful and constitutes evidence of animus. However, these findings do not conflict with the judge's determination, which we adopt, that the Respondent satisfied its rebuttal burden with respect to Campbell.

[9] In adopting the judge's finding concerning the discharge of Bardwell, we do not rely on the judge's adverse inference against the Acting General Counsel for failing to call Reverend Gary Dean as a witness. Nor do we rely on the judge's speculation concerning Bardwell's motivation for informing Dean that a minimum of 30 students was required for establishing a satellite campus.

[10] We adopt the judge's finding, based on Johnson's credited testimony, that Supervisor Ray Akers gave Johnson permission to complete part of prospective student Bessie Miller's application. We further find that the Respondent's failure to investigate the conflict between Johnson's and Akers' accounts of the incident supports the judge's finding that the Respondent failed to meet its *Wright Line* burden. See *ManorCare Health Services-Easton,* 356 NLRB No. 39, slip op. at 3 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011). We find it unnecessary to rely on the judge's statement that Akers admitted giving Johnson permission to complete Miller's application or on the judge's statement that he failed to see the seriousness of Johnson's alleged offense.

[11] Pigati took notes of her interviews with at least six employees. Pigati and employees Bardwell and Johnson all testified about the interviews, with Johnson providing a detailed description of her interview.

or apprehensive in meeting with Pigati and answering her questions. He viewed the meeting as "routine, nonconfrontational, and with no tension or animosity."

In determining whether an interrogation is unlawful, the Board applies a totality-of-the-circumstances test. *Rossmore House*, supra; *ManorCare Health Services*, supra, slip op. at 17. The Board has identified various indicia to be considered in the analysis, although they are not intended to be applied mechanically. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000); *ManorCare Health Services*, supra. These factors include whether the employer has a history of hostility or discrimination concerning employee rights; the nature of the information sought, i.e., whether the interrogator appears to have been seeking information on which to base action against individual employees; the identity and organizational level of the questioner; the place and method of the interrogation; and the truthfulness of the reply. *Westwood Health Care Center*, supra at 939. Contrary to the judge's analysis here, the standard is an objective one, considering whether the questioning would reasonably tend to coerce the employee and thus restrain the exercise of Section 7 rights. *ManorCare Health Services*, supra, slip op. at 17; *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The determination does not turn on whether the questioned employee felt intimidated. Id.

Applying the above standard, we find, contrary to the judge, that Pigati's interrogation was coercive. By the time of this meeting, the Respondent had already demonstrated antagonism toward its employees' protected activity. Notably, in late April 2010, Supervisor Rosa unlawfully interrogated employees on her team, including Johnson, about their knowledge of emails that criticized higher-ups Ison and Chris Landauer. She also forbade them to read or forward such emails and threatened them with discharge if they did so. Moreover, during the same meeting at which Pigati questioned Johnson, she unlawfully admonished Johnson to keep their discussion confidential. She issued the same instruction to each grad team enrollment counselor with whom she met.

With regard to the nature of the information sought, Pigati asked Johnson what she thought about Rosa as a manager. To be clear, we do not discourage employers from monitoring supervisors' performance, including by asking employees about it, if such questioning is done in a noncoercive manner. However, Pigati's questions to Johnson extended beyond Johnson's own views to include the identity of employees who had complained about Rosa. By this additional questioning, regardless whether it was prompted by Johnson's own remark, Pigati sought information concerning protected activity by other employees concerning their terms and conditions of employment. Moreover, based on Rosa's previous interrogation and threatening of the grad team employees about criticism of the Respondent's managers, we find that Pigati's questions could reasonably have appeared to seek information in order to take action against employees. *Westwood*, supra at 339. By failing to state the purpose of the interrogation, Pigati did nothing to diminish such an impression.

The identity of the questioner and the place and method of the interrogation would also have reasonably contributed to a perception of coercion. Pigati, an admitted supervisor, served as the principal human resources contact for the enrollment staff. In this capacity, she participated in all areas of human resources management involving the enrollment counselors, from providing benefits information to advising management on and approving employee discipline and termination. She conducted the interrogations of employees on a one-on-one basis, in her office with the door closed. As noted above, she unlawfully directed employees to keep the discussion confidential, although, based on Pigati's position, employees could reasonably anticipate that their responses would be shared with other members of management.

Only one of the *Westwood* factors, Johnson's apparent candor, favors the judge's determination that Pigati's questioning of her was not coercive, and it fails to outweigh the other indicia of coercion surrounding the questioning. Accordingly, based on due consideration of all of the above factors, we conclude that the interrogation violated Section 8(a)(1).[12]

ORDER

The Respondent, Grand Canyon Education, Inc., d/b/a Grand Canyon University, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing an overly broad written rule in its Employee Counseling Statement that requires employees to agree to the following:

> Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with any other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

[12] Because we find that Pigati's questioning of Johnson constituted an unlawful interrogation, we find it unnecessary to pass on her questioning of other grad team employees, as such findings would not affect the remedy.

(b) Orally affirming an overly broad written rule prohibiting employees from talking to each other about their terms and conditions of employment, including counseling sessions.

(c) Interrogating employees about their involvement with emails criticizing the Respondent and its policies as they affect terms and conditions of employment.

(d) Orally promulgating, maintaining, or enforcing an overly broad and discriminatory rule prohibiting employees from discussing their terms and conditions of employment with other persons, including fellow employees.

(e) Threatening its employees with discharge and other unspecified reprisals because they engaged in protected concerted activities.

(f) Disparately enforcing its Electronic Communications Policy in order to prohibit its employees' use of emails to engage in protected concerted activities.

(g) Discharging or otherwise discriminating against any of its employees because they engaged in protected concerted activities.

(h) Coercively interrogating employees regarding their protected concerted activities or those of other employees.

(i) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, rescind the overly broad written rule in its Employee Counseling Statement that requires employees to agree to the following:

> Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

(b) Within 14 days from the date of this Order, offer Gloria Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Gloria Johnson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Gloria Johnson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 14 days of this Order, remove from its files any reference to the unlawful discharge of Gloria Johnson, and within 3 days thereafter notify her in writing that this has been done and that her discharge will not be used against her in any way.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its campus in Phoenix, Arizona, and its other locations copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2009.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 12, 2013

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce, Chairman

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an overly broad rule in our Employee Counseling Statement that requires you to agree to the following:

> Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

WE WILL NOT tell you that you are prohibited from talking to fellow employees about your terms and conditions of employment, including counseling sessions.

WE WILL NOT coercively interrogate you about your involvement with emails criticizing us and our policies as they affect terms and conditions of employment.

WE WILL NOT orally announce, maintain, or enforce an overly broad and discriminatory rule prohibiting you from discussing your terms and conditions of employment with other persons, including fellow employees.

WE WILL NOT threaten you with discharge and other unspecified reprisals if you engage in protected concerted activities.

WE WILL NOT inconsistently enforce our Electronic Communications Policy in order to prohibit your use of emails to engage in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities.

WE WILL NOT coercively interrogate you about your protected concerted activities or those of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind the overly broad written rule in our Employee Counseling Statement that requires you to agree to the following:

> Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

WE WILL, within 14 days from the date of the Board's Order, offer Gloria Johnson full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Gloria Johnson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Gloria Johnson for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Gloria Johnson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

GRAND CANYON EDUCATION, INC. D/B/A GRAND CANYON UNIVERSITY

Chris J. Doyle, Esq., for the General Counsel.
Richard S. Cohen, Esq. and Jeffrey Toppel, Esq., of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

Gregory Z. Meyerson, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on eight dates between March 29, and June 2, 2011. This case was tried following the issuance of an order further consolidating cases, second amended consolidated complaint and notice of hearing (the complaint) by the Regional Director for Region 28 of the National Labor Relations Board (the Board) on March 11, 2011. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed, respectively, by Edmond Bardwell (Bardwell), an individual, by John Young (Young), an individual, by Shelly Campbell (Campbell), an individual, and by Gloria Johnson (Johnson), an individual. The complaint alleges that Grand Canyon Education, Inc. d/b/a Grand Canyon University (the Respondent, the Employer, the University, or Grand Canyon University) violated Section 8(a)(1) and (4) of the National Labor Relations Act (the Act). As the complaint alleges, among other things, that Bardwell, Campbell, and Johnson were all discharged by the Respondent unlawfully, those three individuals will be referred to collectively as the Charging Parties. The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.1

Counsel for the General Counsel and counsel for the Respondent appeared at the hearing and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observations of the demeanor of the witnesses, I now make the following findings of fact and conclusions of law.2

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent, a Delaware corporation, with an office and place of business in Phoenix, Arizona, herein called the Respondent's campus, has been engaged in the business of operating a private online and campus-based university. Further, I find that during the 12-month period ending March 8, 2010, the Respondent in conducting its operations just described, derived gross revenues, excluding contributions which, because of limitations by the grantor, are not available for operating expenses, in excess of $1 million; and during the same period of time, also purchased and received at the Respondent's campus goods valued in excess of $50,000 directly from points outside the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material herein has been, and employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging its enrollment counselors Bardwell, Campbell, and Johnson (the Charging Parties) because they engaged in protected concerted activities, and also discharged Bardwell in violation of Section 8(a)(4) of the Act because he had previously filed an unfair labor practice charge and gave testimony to the Board. The protected concerted activity allegedly engaged in by the Charging Parties consisted primarily of complaining among themselves, to other enrollment counselors, and to various managers and supervisors about the poor quality of the potential student enrollment leads that they received, the number of telephone calls to leads that they were required to make, the amount of telephone time they were required to spend with these leads, and the number of leads they were required to enroll as students. Additionally, the General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and/or enforcing overly broad and discriminatory rules of conduct concerning protected activity, including the sharing of information regarding wages, hours, and working conditions, and by interrogating and threatening employees regarding their protected concerted activity.

The Respondent denies that it discharged Bardwell, Campbell, or Johnson because they engaged in protected concerted activity or, in the case of Bardwell, because he previously filed charges with the Board. It is the Respondent's position that it fired Bardwell, Campbell, and Johnson, respectively, for separate and distinct reasons, all of which constituted good cause for termination. The Respondent contends that it does not restrict, limit, or prohibit its employees from engaging in legitimate protected concerted activity. Further, the Respondent denies that its policies and work rules as written or applied constituted a violation of the Act.

B. Background Facts

The Respondent is a for-profit, private, accredited, Christian university located in Phoenix, Arizona. The University offers online and campus-based Bachelor's and Master's degree programs through its College of Business, College of Liberal Arts, College of Education, and College of Nursing and Health Sciences. Students obtain their degrees either through online education or by attending classes at the Respondent's main campus located in Phoenix. Additionally, the Respondent has satellite

[1] In its answer to the complaint, the Respondent admitted the various dates on which the enumerated charges were filed, and also admitted that said charges were served on the Respondent in a timely manner.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

or "cohort" campuses in Arizona, and one out of state satellite campus located in Albuquerque, New Mexico, where students attend classes in order to obtain their degrees. The University enrolls significantly more students through its online degree program, estimated at 40,000 students, than it does with its traditional ground campus degree program, estimated at around 10,000 students. For the most part, the Respondent's satellite campuses are located at hospitals or health care facilities where students enrolled in the College of Nursing and Health Sciences can receive hands-on practical medical experience.

In order to maintain desirable enrollment numbers for their online degree programs, the University has developed a highly structured system of gathering and distributing "leads" to enrollment counselors, who would then attempt to contact and enroll the leads in one of the University's degree programs. Leads are simply the names and contact information of those individuals who have expressed interest in becoming one of Grand Canyon University's students. The University obtains these leads from a number of sources including from paid, third party vendors, and also through its own employees, known as outside sales representatives.

The Respondent employs approximately 700 enrollment counselors whose main function is to contact and process these potential students with the intent of enrolling them into one of Grand Canyon University's degree programs. The University categorizes these employees as either "internet enrollment counselors," or "inside enrollment counselors" based on the type of leads that they are given to process.[3] The assistant vice president of the College of Business and Liberal Arts, Chanelle Ison, testified that one of the distinct differences between the internet and inside enrollment counselors was that while both categories of employees could enroll students in online degree programs, internet enrollment counselors were precluded from enrolling students interested in attending traditional live classes. While this distinction no longer exists, it is unclear to the undersigned precisely when this policy changed.

Grand Canyon University has a strict lead delegation procedure that first involves categorizing the lead and then distributing that lead to the appropriate "team" of enrollment counselors. With respect to the internet generated leads (which would be handled by internet enrollment counselors), the process begins when a potential student's information is sent from the vendor to the University's database. From there the lead is automatically routed, with the expressed degree program tagged, to an enrollment counselor that is on a team that corresponds with the degree program of interest. Apparently such routed, categorized leads are automatically distributed according to a set rotation that includes all of the enrollment counselors on a specific team.

Ison testified that enrollment counselor teams include between 10 and 15 counselors, who are supervised by an enrollment counselor manager. While Ison's testimony regarding this matter is somewhat confusing, it appears that during the period under consideration, enrollment counselor teams in the Colleges of Business and Liberal Arts were limited to enrolling students in either graduate or undergraduate programs, but not both. In any event, at the time of their respective terminations, the three Charging Parties were all employed as internet enrollment counselors for the graduate degree programs in the College of Liberal Arts.

All enrollment counselors employed by the University are subject to certain quota requirements with respect to their job duties. Although not entirely clear, it appears from Ison's testimony that during the period in question, all enrollment counselors were subject to the very same quota requirements, regardless of the number of degree programs they were assigned. For the three Charging Parties who were assigned to the graduate degree programs team in the College of Liberal Arts, that meant that they were limited to enrolling internet students who were seeking graduate degrees in either criminal justice or Christian studies. Having only two degree programs in which to enroll students placed this graduate degree program team at something of a disadvantage when compared to other teams where enrollment counselors had more degree programs available in which to enroll students.[4]

The quota requirements that the enrollment counselors worked under changed frequently. However, Ison testified that under the University's "Enrollment Counselor Compensation Plan," which became effective on May 1, 2010, all enrollment counselors were expected to log a 3 month average of 80–89 dials (calls) per day, and to average between 3 and 4½ of student talk time per day. (GC Exh. 4, p. 4.)

The three Charging Parties adamantly and repeatedly testified that the University's quotas were the main source of frustration for all the enrollment counselors on the graduate degree team. These team members were all expected to meet the same quotas as those on the other teams. It appears from the testimony of employee witnesses that the University was continually increasing the quotas. Shelly Campbell testified that the quota of 80 dials per day, in effect when she was hired, increased incrementally to 120, then 160, and ultimately 180 dials per day. However, I have some doubt as to the accuracy of Campbell's figures, since Gloria Johnson placed the quota of dials as between 80 and 120 per day. Additionally, witnesses testified that the total "talk time" with perspective students also was increased over time.

Both Campbell and Johnson testified that there could be adverse consequences for an enrollment counselor who failed to meet his or her quota. According to Campbell, a counselor failing to meet quota could "lose salary [at] review time," and "could be terminated," and that the counselors "were constantly in fear of [losing] our jobs." Similarly, Johnson testified that failing to meet quotas "would affect our merit review with a combination of other things," that a counselor "could actually get a write-up," and potentially be terminated. The record contains a copy of an email from enrollment counselor manager Ellen Rosa to several team members, including Charging Party

[3] There is some confusion in the record regarding the terms "online enrollment counselor" and "internet enrollment counselor." Although counsel for the General Counsel appeared to use these terms interchangeably, there was some indication in the record that during some period of time, these were two distinct job classifications.

[4] Within each degree program, there were a number of individual degrees available.

Edmond Bardwell, dated February 19, 2010, in which she states, "You need to get your dials up [,] even if the talk time is good remember that GCU policy is 4 hours and 120 and we are expected to be held accountable to that." (GC Exh. 51.) The 4 hours is an apparent reference to the amount of time per day that counselors are expected to spend talking with prospective students, while the reference to 120 is apparently the number of calls per day that a counselor is expected to make.[5]

In addition to the quotas regarding minimum numbers of calls made and total "talk time," the University also required that enrollment counselors enroll a minimum number of students. Chanelle Ison testified regarding Grand Canyon University's "Minimum Enrollment Expectations" policy as found in the Compensation Plan. (GC Exh. 4, p. 4.) Her testimony was somewhat confusing, but the written expectation policy seems clear. New enrollment counselors are expected to have ensured that at least three students have completed their first online course by the end of the counselor's 5th month of employment, and are expected to have ensured that at least two students have completed their second online course by the end of the counselor's 6th month of employment. The number of expected course completions rises once an enrollment counselor has become "tenured" or has worked more than 6 months.

As is obvious from the above, enrollment counselors were expected to maintain contact with the students that they enrolled in the University, at least through the period that the student was matriculating through the first several courses in which he or she was enrolled. This was to ensure that difficulties, which the new student might be having in registration, course selection, or with online access to the course materials, could be remedied. Thus, both the University and the enrollment counselor had a vested interest in making sure that the enrolled student was successfully managing the course enrollment process. The Charging Party witnesses confirmed this requirement. However, they contend that the enrollment expectations quota continued to increase during the term of their employment. Campbell testified that by the time that she was terminated on February 23, 2010, her enrollment quota had increased from 12 students every 2 months to 12 enrollments every month. Johnson's memory of enrollment quotas was slightly different, as she recalled the requirement being 8 to10 students every "start period," which was approximately every 4 to 6 weeks.

In any event, all three Charging Parties testified that they vigorously and clearly expressed their frustration with the quality of the leads that they were receiving and the fluctuating and difficult to meet quotas. They claim that these frustrations were repeatedly discussed among the members of the graduate team and directly with the Employer's various supervisors and managers. While the various witnesses for the Respondent and the General Counsel each seems to recall dates and events somewhat differently, there is general agreement that starting sometime in the latter part of 2009 or early 2010, the "grad team" was created for the College of Liberal Arts (COLA) by merging the criminal justice and Christian studies teams, and by limiting the enrollment counselors in that team to enrolling only graduate students.

Two additional sources of irritation to the members of the grad team were the Employer's decisions during this same approximate time period to preclude the members of the grad team from enrolling prospective students that had attended school outside the United States, the so called international students, and also to preclude the enrollment of students who lived in the State of Arizona, where all three Charging Parties lived. The grad team members were not permitted to enroll these international student's or Arizona residents, despite the fact that they were interested in a graduate degree program in Christian studies or criminal justice. As far as the Charging Parties were concerned, this exclusion simply made the pool of prospective students they could enroll even smaller, making it progressively more difficult to meet the University's quotas.

The grad team was supervised by a series of enrollment counselor managers, namely Helen Schnell, Ellen Rosa, and Ray Akers, each of whom was an admitted statutory supervisor during certain of the period of time in question. Schnell and her successors would typically hold mandatory weekly team meetings, and frequently also hold "daily huddles," around the supervisor's desk. It was during these meetings that the Charging Parties and other members of the team would express their displeasure and frustration with the poor quality of the leads the team received and with the Respondent's quotas, which were increasingly difficult for the team members to meet.

There really is no dispute that these subjects were repeatedly discussed among the team members themselves and with the various supervisors who successively managed the team. While the Respondent does not deny that such complaints were raised by the three Charging Parties, counsel for the Respondent in his posthearing brief takes the position that the ultimate decision maker regarding the terminations of Campbell, Johnson, and Bardwell, namely Sarah Broeder, senior vice president of operations, was personally unaware of their protected concerted activities. Further, it is the Respondent's position that while the Charging Parties made complaints about leads and quotas, that everybody on the team made such complaints, as acknowledged by the Charging Parties, and that there is no evidence that Campbell, Johnson, and Bardwell were any more aggressive in presenting these complaints than the other members of the grad team. Finally, it is the Respondent's position that it actively encouraged its enrollment counselors to raise workplace concerns, over which it would certainly not seek to terminate them for doing so. Rhonda Pigati, a human resources manager and admitted supervisor, testified that Rebecca Garrett, Brad Bender, and Minal Padagaonkar, grad team enrollment counselors, were all vocal in expressing concerns about leads and other issues, and that all were still employed by the University.

In setting forth the work related complaints that the Charging Parties and other team members made to their supervisors, Campbell testified very specifically regarding "the fact that the workload had basically tripled from initially when we first started," and that "the leads that we were getting for prospective students were terrible." She also stated that, "the quotas that we were held to were unattainable, even if you were a top

[5] This reference to 120 calls per day seems to support Johnson's testimony.

performer as I was." The entire grad team, according to Campbell, was "always voicing that to management because we were only able to enroll in select programs."

Johnson and Bardwell shared the same sentiments as Campbell, and testified that they and other employees on the grad team were constantly vocal amongst themselves and to their supervisors during weekly meetings and daily huddles about work-related issues, including the poor quality and lack of leads and the changing and difficult to meet quotas. However, Johnson did note that not everyone on the team would speak up about their work related frustrations. She said that "some were afraid to speak up. But they would come to us [Johnson, Campbell, and Bardwell] and talk to us. You only had a few that would actually speak up in the meetings, or you may have some that said, yeah, I agree, but not really voice their opinions." The clear implication being that the Charging Parties were the most vocal employees on the team.

Besides complaints regarding the quality of the leads and the difficult quotas they had to meet, members of the grad team also complained about the limited number of graduate degrees offered at the College of Liberal Arts under the Christian Studies and criminal justice programs (a total of seven) in which they could enroll students, and also complained about having to "give away" prospective student referrals for international students and those students that lived in Arizona. Other teams of online enrollment counselors had many more degrees to offer potential students, and other teams had been established specifically to enroll international students and Arizona residents.

It is undisputed that not only were the grad team supervisors very aware of the various complaints made by team members, but that they responded to those complaints. Campbell and Johnson both testified that grad team supervisor Helen Schnell was sympathetic to the employees' frustration and that she stated she would try and do what she could to get the team better leads. Johnson testified that even after Campbell was terminated the team members continued to raise the work conditions issues with Supervisor Ellen Rosa during the weekly meetings and daily huddles. Rosa told the team that "she understood what we were talking about, that we were the specialty team, which was the master's in criminal justice and Christian studies, and that those were the only programs that [we] had," and that "she couldn't get any more programs but she would work on getting us some better leads from management." Bardwell testified that supervisor Akers, in response to the work-related issues that were raised at various meetings, stated the grad team "had to work through them" and that "it probably wouldn't get any better."

In addition to complaining to their immediate supervisors, members of the grad team, including Johnson and Bardwell, also met twice with Assistant Vice President Chanelle Ison. These meetings were held in late April 2010 and again in July 2010. According to Johnson, the grad team members expressed their concerns regarding poor quality leads, and the lack of degree programs available in which to enroll students, making it difficult to meet quotas as compared to other teams that had more degrees available for prospective students. Ison asked the counselors to make and provide to management a list of poor quality leads and promised to work on getting them better leads, but she was adamant that there would be no added degree programs in which the grad team could enroll students, and that there would be no adjustment in the team's quotas.

As the Respondent takes the position that the three Charging Parties were terminated in part because of their inappropriate statements made to students or prospective students during recorded telephone conversations, it is important to discuss the University's quality assurance program, which involves the recording and monitoring of such calls. In late 2009, Grand Canyon University created a quality assurance department for the purpose of monitoring interactions between students or prospective students and staff members. Sarah Boeder testified that the telephone recording system, also known as "NICE,"[6] records and categorizes telephone calls made or received by the enrollment counselors on the University's equipment for the purpose of monitoring the content of those calls. Chanelle Ison testified that the enrollment counselors, whose main job duties made them constantly subject to quality assurance monitoring, were given "various ongoing trainings" on how to conduct themselves during a telephone interaction with a student.

Apparently, many, but not every call is recorded. It is unclear from the record whether the calls are recorded at random, or if they are selected for recording. It is also unclear how quality assurance selects which recorded calls will be monitored. Ison explained that even though quality assurance's day-to-day monitoring involved screening calls based on a specific category of call, the department also had the ability to specifically select individual calls based on the date or the name of the student or enrollment counselor involved. Boeder testified that NICE allows an interested party to query an individual counselor by name and select from a list of all the calls they have made, inbound and outbound, that had been recorded during a specific period. Recorded conversations are kept up to 6 months before they are destroyed.

Grand Canyon University maintains an Electronic Communications Policy, which regulates employee usage of the Employer's email system, among other things. This policy is outlined in the Human Resources Policies and Procedures manual under the subsection for compliance, which has been in effect since November 1, 2008. (GC Exh. 5.) The policy states in relevant part that: "Email should be used for the purpose of University business. Inappropriate use includes . . . . Emails considered discriminatory or harassing in nature; Sending chain letters or participating in any way in the creation or transmission of commercial email (spam) that is unrelated to legitimate University purposes; Engaging in private or personal business activities; and/or sending, receiving, or accessing pornographic materials." Further, the policy prohibits use of the University's email system for a number of uses, including: "Employees may not use an electronic communication system for a purpose found to constitute, in the University's sole and absolute discretion, a commercial use not for the direct and immediate benefit of the University and/or if the use is competitive to the interests of the University . . . . Employees may not send unsolicited

[6] It is unclear what the acronym stands for.

email messages to anyone, but especially containing statements or subject lines that are misleading or represent the University. (CAN–SPAM Act of 2003)."[7]

However, despite its written email policy, the testimony of various witnesses established that the Respondent freely permits its employees to send and receive emails that are non business related, as well as business related. This includes the sending and receiving of humorous emails and those of a personal nature. Further, while the policy specifically prohibits what is referred to as "inappropriate use" of the email system and emails considered "discriminatory or harassing in nature," nowhere in the policy is there any attempt to define or explain what the Employer means by those terms.

1. Shelly Campbell

Shelly Campbell began her employment at Grand Canyon University on April 7, 2008, and she remained employed there until her termination on February 23, 2010. When she initially began work in early 2008, Campbell's' immediate supervisor was Josh Ellis, who was succeeded as enrollment counselor manager by Helen Schnell at some point in January of 2009. Schnell was replaced by Ellen Rosa at or around the end of January 2010, and was Campbell's immediate supervisor at the time of her termination.

When the Respondent hired Campbell in April 2008, the Respondent had not yet issued its Electronic Communications Policy, and according to Campbell she was never provided with a copy. From at least July 1, 2009, through the end of her employment, Campbell sent work and nonwork related emails to her coworkers on the University's email system. (GC Exhs. 11–12.) Campbell testified that none of her coworkers ever informed her they found her emails offensive or inappropriate. However, management apparently did not view her emails the same way, as she was "talked to" by management in response to an email that she forwarded to fellow employees on September 11, 2008, regarding the 9/11 attacks.

Campbell's use of the University's email system continued to get her into trouble. She testified that on July 1, 2009, she forwarded an email to coworkers that included a joke referencing a jellyfish sting injury to a diver's buttocks. (GC Exh. 11.) The following day she emailed another "joke" regarding racial issues to fellow employees using the University's system. That same day, Linda Lair, a human resources manager and admitted supervisor, sent Campbell an "email warning," which advised her that Lair had received a complaint regarding certain "personal jokes and other commentary [sent] to employees via work email." Lair further indicated that Campbell had previously been warned by management that she was "not to use company email for these types of communications." The current warning cautioned that: "While occasional personal use of the University's email system is understandable, forwarding jokes, personal commentary and potential offensive information is not. Since you have been instructed on previous occasions regarding the risks of using the University's email system inappropriately, going forward, you are required to cease ALL personal use of the University's email system. If you continue to disregard these instructions which you've been given on numerous occasions, then disciplinary action will be forthcoming." (R. Exh. 1, Bates stamp 0491, first page of Campbell's termination request.)

Despite the warning that she received from Lair, Campbell's email problems continued. On the morning of August 3, 2009, Campbell sent out a chain email to her team members and some of her supervisors with a recently enrolled student's name and an attached picture of a sunbathing woman. According to Campbell, management encouraged their enrollment counselors, as a motivational tool, to send out "daily countdown" emails to team members which contained names of recently enrolled students with an attached picture of the counselor's choice. This was allegedly what precipitated Campbell's email with the name of a recently enrolled student, accompanied by the picture of a sunbathing woman.

However, apparently this type of picture was not what management had in mind, as, almost immediately, Jacob Mayhew, the director of enrollment, replied back to the entire team instructing them that "pictures need to be appropriate." (GC Exh. 12.) Mayhew also emailed Campbell individually informing her that the picture was not appropriate and that she should "change [the] picture," which she then did. (GC Exh. 13.)

On August 10, 2009, Campbell was issued an "Employee Counseling Statement," which was signed by Linda Lair and advised Campbell that the sunbathing photo was "an inappropriate use of the University's email system," and offended some of her teammates. It further referenced a July 7, 2009, warning that she had previously received from human resources regarding inappropriate use of the University's email system.[8] The statement further indicated that: "You are expected to conduct yourself in a professional manner at all times, which includes following the University's policies regarding appropriate communications and computer usage. As a consequence for repeated disregard for the University's policy in this regard, you are prohibited from any future personal use of the University's email system. Any further incident where you fail to adhere to the University's policies in this regard or any other will be reviewed by management on a case-by-case basis and a determination made regarding the continuation of your employment." (GC Exh. 14.)

It is important to note that the employee counseling statement that Campbell received on August 10, 2009, required her signature, and that just above the signature line appears the following language: "Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential

[7] It is assumed by the undersigned that even though this policy has been in effect since November 1, 2008, the complaint only alleges its existence since September 8, 2009, as this date is less than 6 months prior to the filing of the first unfair labor practice charge, which allegations are raised in the complaint before me, and might otherwise run afoul of Sec. 10(b) of the Act. As will be discussed further below, the General Counsel alleges in pars. 4(b) and 5 of the complaint that this language constitutes a violation of Sec. 8(a)(1) of the Act.

[8] I assume that the date was simply a typographical error and that rather than July 7, 2009, the reference was really to the warning Campbell had received on July 2, 2009.

and may not be discussed with any other current or former employee of Grand Canyon University, its constituents, venders, or contractors, without prior written notice to and approval from Human Resources." (GC Exh. 14.) It appears from the Employee counseling statement that this is "boilerplate" language, which language the University utilizes whenever the form is used to discipline an employee.[9]

As part of its Quality Assurance Program, Todd Christianson, a member of that team, listened to a recorded telephone call between Campbell and a prospective student made on December 2, 2009. He testified that he specifically remembers the call because of "the egregious things that actually took place during this call." Christianson explained that this call received a total score of 3 out of 100 based on a scoring matrix that included various categories such as "information accuracy" and "clear communication." This scoring matrix is documented on a "Quality Assurance Summary" that includes the rating for each performance category and a comments section that includes direct quotes from the call. Christianson also explained that when he gets a "failed call" that includes compliance issues, he will notify his manager who would then notify the enrollment counselor's manager.

Sometime in early December of 2009, there was a management meeting attended by Grand Canyon University's CEO, Brian Mueller, Sarah Boeder, senior vice-president of operations, and various other managers. As the Quality Assurance Department had been established and operating for approximately a month, management decided to listen to a selection of calls during the meeting to, as testified by Boeder, "hear what's going on . . . to hear what our students are saying . . . [and] to hear what our—how our employees are talking to students, et cetera." According to Boeder, she did not instruct Quality Assurance to select the calls of any specific employees but only to compile a sample of "good and bad calls."

Campbell's December 2, 2009 call was part of the sample that management listened to during the meeting. According to Boeder, after listening to portions of the call, Mueller asked that it be turned off and stated that: "This is exactly what we don't want happening. This is a perfect, perfect example of one of those things that, if a regulatory agency heard this, this would jeopardize the university. It puts us at huge risk." Mueller then instructed Boeder to meet with the employee and the employee's manager regarding this call.

On December 16, 2009, Boeder and Enrollment Manager Schnell met with Campbell to discuss the various alleged infractions that had occurred during the December 2 call. Initially, the supervisors played the call for Campbell and then Schnell proceeded to ask her what she thought she did right during the call and what she may have done wrong. According to Boeder, Campbell responded by stating that the tone of the call could have been better, but did not mention anything about potential compliance violations that occurred. Boeder said that they were more concerned about the content of the call, and she then discussed the mistakes that Campbell that allegedly made. These mistakes were ultimately listed as bullet points in a December 30, 2009 Employee counseling statement that Campbell received. They included: "Misrepresentation of the University's Academic Scholarship; Speaking to the student about Pell [Grants] and eligible amount; Indicating that the student would incur no out-of-pocket costs; Leading the student to believe that the program would take only 2 years to complete without reviewing transcripts; Communicating to the student that the program is accelerated; Misquoting the cost per credit hour; Citing the University had 'beat Harvard and Yale' to be recognized for online excellence; Communicating to the student that there are no tests in the online programs; Guaranteeing employment; [and] Indicating salary amount that could be expected upon completion of the program." (GC Exh. 6.)

Boeder testified that during the meeting Campbell became very defensive and mentioned that she felt as if she was getting singled out for saying things on the phone call that everyone was saying. Moreover, Campbell stated that certain infractions listed in the call were things that she had overheard other enrollment counselors say and chose to use them in her own calls. When cross-examined by counsel for the Respondent about the alleged infractions in the December 2 call, Campbell claimed that some of the information that she had given the student was actually correct, and that other statements that she had made were the same type of statements other enrollment counselors made to prospective students. She insisted that she had heard them make such statements from their work stations, even though she had previously testified that she wore a headset while on the phone with students.

Campbell's assertion that other enrollment counselors were engaging in the same questionable practices concerned Boeder because the Quality Assurance Department had just recently been established and management was not sure as to the extent of any potentially serious systemic compliance violations their enrollment counselors were engaging in over the phone. In any event, Campbell did not offer the names of any other enrollment counselors who she had overheard talking with potential students. Campbell claims that at the end of the meeting both Boeder and Schnell cautioned her not to discuss with anyone the alleged infractions that the managers had raised with her.[10]

On December 30, 2009, Campbell received an employee counseling statement regarding her telephone call with the prospective student on December 2, for which she was counseled on December 16. As mentioned above, the counseling statement contained those alleged infractions as bullet points. (GC

[9] As will be discussed in detail later in this decision, the General Counsel has alleged in pars. 4(c) and 5 of the complaint that this language is in violation of Sec. 8(a)(1) of the Act. It is assumed by the undersigned that the complaint only alleges the existence of this language in the employee counseling statement since September 8, 2009, as this date is less than 6 months prior to the filing of the first unfair labor practice charge, which allegations are raised in the complaint before me, and might otherwise run afoul of Sec. 10(b) of the Act.

[10] It appears that these statements by Boeder and Schnell are alleged by the General Counsel in par. 4(d) of the complaint to constitute a violation of Sec. 8(a)(1) the Act. Statements, above the employee's signatory line was a boiler plate statement regarding confidentiality.

Exh. 6.) As with all such Employee Counseling.[11]

Sarah Boeder testified that she personally made the decision not to terminate Campbell based on the December 2 telephone call, mainly because of the concern that the regulatory issues were more widespread. Because of this concern and Campbell's statement that the other enrollment counselors in her area were engaging in the same infractions, Boeder instructed Quality Assurance to investigate other enrollment counselors' calls in the specific area of the building where Campbell made her daily calls. Based on that investigation, Boeder testified that they did not find any calls that were "even close" to the one Campbell had made on December 2.

Another incident involving Campbell occurred around January 20, 2010. On that date, she received an email from another enrollment counselor, Jacob Husband, making fun of the University's lead policy as it related to the referral of leads to other teams. (GC Exh. 43.) Campbell subsequently forwarded this email to several other enrollment counselors and a student using the University's email system. Campbell testified that she forwarded the email to the student inadvertently, but apparently sent the message on to her coworkers because she found it funny. She testified that when she realized that she had mistakenly sent the email to the student, she called and asked her to delete the message, but not before joking with the student about the contents of the email. While it does not appear that any specific disciplinary action was taken against Campbell for forwarding the sarcastic email about the University's lead policy to other counselors and a student, it is subsequently mentioned in her final Termination Request form as another example of misconduct on Campbell's part. The termination report references the incident and states that Campbell made "disparaging remarks to the student" about the University's lead policy, and that such "comments were unprofessional and did not reflect upon GCU in a positive manner." (R. Exh. 1, Bates Stamp 0493.)

On February 9, 2010, Campbell sent an email to student Donnell Miller that gave her instructions for accessing a weekly homework assignment. (GC Exh. 17, and R. Exh. 1, Bates Stamp 0518.) Miller had contacted Campbell because she was unable to get logged onto her online account, which was necessary to get the weekly class assignments. This was a technology issue of some kind. Miller was apparently a student that Campbell had enrolled in the University. Campbell testified that there could have been significant repercussions for the student if she was not able to log into the system and into her class, including potentially being dropped from the class or receiving no credit on the assignment.

The University has a very strict policy against assisting a student academically. However, Campbell contends that the student was very upset because, as a new student, she was afraid of falling behind in her assignments. Campbell was able to email the information to Miller because she had in her possession a copy of the class syllabus for this particular class, UNV 101. Campbell testified that before she emailed Miller the instructions for the weekly homework assignment, she attempted to get the technical issue resolved, but was simply directed to contact the technical support unit. She also testified that her immediate supervisor, enrollment counselor manager Ellen Rosa, did actually give her permission to email the student with the information before she sent it, allegedly saying that, "[i]t would be fine [to send the information] because it was our . . . error, but don't make it a habit." However, Rosa testified that she did not give Campbell permission to send the email in question, and was only made aware of the email by Campbell the day after it was sent.

Similarly, Campbell claimed that she had spoken to Erin Hernandez, enrollment manager, and Chris Landauer, assistant director of enrollment, about the student's problem, prior to sending Miller the email. However, both managers testified that they only learned about the student after hearing that Campbell had sent her the email with the link to the information. According to Landauer, he only became involved in the incident once it was reported as a possible compliance violation. (R. Exh. 1, Bates Stamp 0519–0520.)

Rosa testified that the specific course that the student was having a problem with is called "University Success." It is designed to make the online students familiar with the use of the computer to "navigate around the classroom," including how to access resources. Being able to access a homework assignment was one aspect of the course, and by sending Miller access to the assignment through a link in an email, Campbell was, according to Rosa, giving the student academic, and not merely technical assistance. This was prohibited under the University's compliance policy. Chanelle Ison, associate vice-president, testified that any enrollment counselor who sent a homework assignment link to a student, as Campbell had done, would be "disciplined," and if there were "multiple infractions . . . would be terminated."

At some point after Campbell sent the email to Miller, Campbell and Rosa had a discussion about the issue, during which Rosa asked to see a copy of the email. Rosa testified that after reviewing the email, she became concerned about a possible compliance violation, and, so, she discussed the matter with Erin Hernandez, who advised that they talk with Linda Lair, human resources manager. Rosa also brought this matter to the attention of Chris Landauer. After determining that a compliance violation may have occurred, he sent an email to Heyward Howell, compliance officer, on February 11 detailing the incident. Howell responded the following day and instructed Landauer to "follow up with Linda," and that he would assist in gathering evidence in the matter. (R. Exh. 1, Bates Stamp 0519–0520.)

The decision to terminate Campbell was ultimately made by Sarah Boeder, senior vice-president of operations. She testified that this decision was not based on a single instance of inappropriate conduct, but, rather, by a pattern of misconduct. Boeder was particularly troubled by Campbell's "bad call" to a prospective student in December of 2009 as recorded by the Quality Assurance Department, and the February 2010 incident involving improper assistance given to student Miller. The termination request for Campbell was dated February 16, 2010, and lists in detail the various disciplinary warnings, counseling

[11] As mentioned earlier, the General Counsel alleges in par. 4(c) of the complaint that such language in employee counseling statements constitutes a violation of Sec. 8(a)(1) of the Act.

sessions, and retraining that Campbell had received over the period of her employment. The document indicates that it has been reviewed and approved by Ellen Rosa, Chris Landauer, Chanelle Ison, Linda Lair, Rhonda Pigati, and ultimately by Sarah Boeder.

On February 23, 2010, Ellen Rosa and Linda Lair met with Campbell to inform her that she was being terminated. According to Campbell, all the items on the termination request form (GC Exh. 7) were discussed with her as reasons for her termination, with the exception of the July 2, 2009 email warning and the August 3 incident involving the picture of the sunbathing woman. Further, she testified that when the January 20, 2010 sarcastic email regarding the change in the University's policy regarding leads for international students was raised, Rosa told her that "[counselors are] not allowed to ever send out non-business related emails."[12] Following her termination interview, Campbell was escorted out of the building.

From his posthearing brief, it is clear that counsel for the General Counsel takes the position that Campbell was fired principally because on January 20, 2010, she forwarded an email to fellow enrollment counselors and a student that "mocked Respondent's policy change regarding international leads." On the other hand, counsel for the Respondent cites the testimony of Sarah Boeder who stated that while the cumulative infractions committed by Campbell resulted in the decision to terminate her, what really upset Boeder was the "bad call" made in December of 2009 to a prospective student and the February 2010 incident where Campbell improperly assisted student Miller. While the human resource representative who prepared the termination packet referenced, among other infractions, a series of inappropriate emails that Campbell had sent, Boeder testified that her decision was not based on those emails. Therefore, counsel argues that Campbell's termination was not based on her violations of the Respondent's Electronic Communications Policy.

2. Edmond Bardwell

Edmond Bardwell began his employment at Grand Canyon University on January 3, 2006, and was last employed there as an enrollment counselor when terminated on September 2, 2010. In order to place his termination in context, it is necessary to review his employment history and in particular the number of different positions that he held at the University.

Bardwell began working at the University as an enrollment counselor for the College of Business and Liberal Arts. After 6 months, he was promoted to the position of inside sales representative. However, he claims to have had a "dual role" that included certain outside sales representative duties. In that capacity, he claims to have traveled to various states outside of Arizona on behalf of the University. After approximately 8 months, he was transferred back to the position of enrollment counselor where he continued until August 2008 when he was promoted to outside sales representative.

Bardwell testified that about that time he met with members of management during an executive luncheon, at which he presented an executive of the University with a business proposal about the Christian studies department. As a result of his proposal, he was permitted to solicit for leads directly at churches and church conventions. Regina Madden testified that during part of the time that Bardwell was soliciting at churches, she was his enrollment manager. She confirms that as an outside sales representative his duties included establishing partnerships with churches in order to solicit student leads. However, at some point Jacob Mayhew, the director of enrollment, informed her that Bardwell's position was going to be changed since his work with the churches was not benefiting the University. He was going to be transferred back to an inside enrollment counselor. Shortly thereafter at a meeting with Bardwell, Madden, and Mayhew, Bardwell was, according to Madden, informed by Mayhew that he had 30 days to wrap up his relationship with the churches, after which he was expected to return to the job of an enrollment counselor.

Bardwell admits that he was transferred back to his old position as an enrollment counselor. However, he claims that he still had authority to work with churches, if the opportunity presented itself. He claims that Mayhew told Madden "to give [Bardwell] some liberty to go to meetings outside the normal online, sitting in a cubicle." Further, he understood that this "dual role" was open-ended with no sunset date. However, as noted, Madden disagrees, contending that Mayhew's instructions to Bardwell were clear, that he must relinquish his direct church solicitation duties and return full time to the position of an enrollment counselor.

As proof of Madden's testimony, counsel for the Respondent offered into evidence a typewritten document entitled "Team Madden, Internet Business Enrollment" setting forth Bardwell's duties and responsibilities as an enrollment counselor. Under the heading "Additional Clarification for Ed Bardwell" it states: "As an Internet Enrollment Counselor, you should have no further direct contact, on behalf of GCU, with any of the churches or church entities that you may have already contacted or would be contacting in your previous role as a OSR [outside sales representative]." Next to this language is written in pen the statement "5 churches for 30 days." Also written in pen is the date "July 1." This language would seem to support Madden's testimony that Bardwell was to relinquish all contacts with church organizations on behalf of the University within the next 30 days, meaning June 1 to July 1. The document has a printed date at the bottom of the first page of May 19, 2009, and has a place for Bardwell's signature. However, the copy in evidence is unsigned. (R. Exh. 12.) While Madden testified that she saw Bardwell sign the document, Bardwell testified to the contrary that he did not recall any such document.[13]

It is further worth noting that this document, also under the heading "Additional Clarification for Ed Bardwell," contains

[12] It is apparently this alleged statement by Rosa that the General Counsel contends in complaint pars. 4(k) and (5) constitutes a violation of Sec. 8(a)(1) of the Act. It should be noted that the complaint names Lair as the supervisor who allegedly made the statement, but Campbell testified that the remark was made by Rosa.

[13] As will become apparent later in this decision, this is relevant as to what authority Bardwell may have had to establish a satellite campus in the City of Texarkana, Texas, and what he may have promised a Reverend Dean in that community.

certain language, which seems to suggest that the University did not totally trust Bardwell and was determined to place him under close supervision so far as any outside activities in which he might try and involve the University. This language reads as follows: "Any future pursuit of other opportunities within GCU, whether they be additional job responsibilities, different job duties, or a change altogether, will need to be pursued with complete transparency, and in keeping with GCU's standard hiring practices which, among other things, requires approval by your manager on an Internal Application." (R. Exh. 12.)

Bardwell has filed several charges against the University with the Arizona Attorney General's Office, Civil Rights Division and with the U.S. Equal Employment Opportunity Commission (GC Exh. 46, February 10, 2009, and GC Exh. 48, March 8, 2010). These charges allege employment discrimination on the basis of race (Bardwell is an African-American) and religion (Christian). While somewhat confusing, it appears that both charges are currently still pending. (GC Exhs. 47 & 49.)

According to enrollment counselor Gloria Johnson, at some time between the end of March but before April15, 2010, Bardwell approached her and asked if she was interested in setting up a meeting with Chanelle Ison, associate vice-president, for the purpose of discussing the problems that the grad team was having with low quality leads, the lack of degree programs that could be offered to prospective students, and other general issues with management. Johnson indicated that she was interested, and such a meeting was held between Ison and the entire grad team around April 14, 2010. There is a dispute, however, on who prompted the meeting, with Johnson suggesting that Bardwell did so, soliciting support from coworkers to have a team-wide meeting where they could discuss their discontent about their working conditions. On the other hand, Ison testified that the meeting, which she referred to as "Start, Stop, and Continue," was her idea and that she had already met with a number of other enrollment counselor teams prior to the grad team.

In any event, regardless of who initiated the meeting, Ison met with the grad team for one of her periodic "Start, Stop, and Continue" meetings on about April 14. There is no dispute that the meeting included a team-wide discussion of a number of sources of work-related frustration the grad team was dealing with, including specifically the low quality leads. Ison replied that she understood the frustration and was attempting to get the team better leads. She asked that the team designate someone who could compile a list of bad leads and report back to her. Enrollment Counselor Brad Bender volunteered. Also during the meeting, Bardwell proposed the idea for a "peer review" from the enrollment counselors for their managers. Ison asked Bardwell to work on producing some sort of questionnaire. He subsequently prepared such a form and gave it to Ison to review. Ison was apparently appreciative of Bardwell's efforts, because on April 14, 2010, she sent him an email thanking him for volunteering to "put the form together." Further, she informed him that she had "sent the request to HR," and would let him know of their reaction. (GC Exh. 9.)

There was a follow up meeting between Ison and the grad team in either late April or early May 2010. During the meeting, they discussed Bardwell's earlier suggestion regarding a peer review process for managers. However, Ison indicated that a decision had been made not to implement such a peer review for managers. Bardwell voiced his displeasure with the decision, stating that it was crucial for the grad team to have a survey because it would help improve morale. Bardwell testified that after the meeting, Ison approached him at his desk. As the two were walking down the stairs leaving for the day, Ison said that she was concerned because during the meeting he had been upset with her and had spoken to her in a "disrespectful" way. Bardwell replied that he was not trying to be disrespectful, and thought the meeting was "an open forum." That was the extent of the conversation.[14]

In early April of 2010, Ellen Rosa held one of her regular weekly meetings with the grad team. According to Johnson, during this meeting Rosa instructed the team that they "needed to enroll 50 more students for the April start date." When Rosa stated that "upper management had called her and told her" that this was the new quota, Johnson replied that she "thought it was crazy for them to ask us that because our leads were horrible as it was and right then, we were lower than what we should've been anyway." Johnson spent time over the next months continuing to discuss the enrollment lead issues, the quota situation, and other employment related issues with fellow team members.

Apparently in late April 2010, an employee sent an email to coworkers over the Respondent's email system criticizing Chanelle Ison and Chris Landauer. Johnson testified that at some point in late April, Ellen Rosa approached her privately regarding the email mentioning Chanelle Ison and Chris Landauer. Johnson told Rosa that she had received no such email. Rosa replied that, "if [you] get the email, delete it and [do] not read it," that "whoever sent the email would be terminated," and that "if anybody else is caught forwarding the email, they would be terminated." Johnson also testified that later that same day, Rosa called a team meeting and relayed to the entire team that same information about the email that she had given earlier to Johnson.

Bardwell also recalled Rosa talking with the grad team employees about this email criticizing Ison and Landauer. He testified that she told the counselors, "They're firing individuals for forwarding this email. If you get this email, you better delete it." Bardwell claims that Rosa also asked him specifically whether he had received the email, to which he responded that he had not. Allegedly she told him individually that if he gets the email to delete it, or he might get fired.[15]

During the second week of June 2010, Rhonda Pigati, a human resource manager and admitted supervisor, held a number of private one-on-one meetings with some members of the grad

[14] It is alleged in complaint par. 4(h)(1) and (2) that this statement by Ison constituted a violation of Sec. 8(a)(1) of the Act.

[15] The General Counsel alleges in complaint pars. 4(g)(1),(2), and (3) that these statements by Rosa constituted a violation of Sec. 8(a)(1) of the Act.

[16] The General Counsel alleges in complaint pars. 4(i)(1) and (2) that these statements by Pigati constituted a violation of Sec. 8(a)(1) of the Act.

team regarding concerns raised by individuals on the team. While Pigati testified that she did not inform the counselors specifically regarding the purpose for the meetings, it is apparent from the employee interview notes that she took, that Pigati wanted to get the employees' evaluation of team supervisor Ellen Rosa and of her leadership abilities, as well as to determine the level of team morale. (GC Exhs. 32–37.)

According to Johnson, when she first sat down for the meeting, she was told by Pigati that Pigati "was meeting with everyone on the team and that whatever we talked about in that office, to keep it confidential." Pigati proceeded to ask Johnson what she thought about Ellen Rosa as a manager. Johnson indicated that Rosa was trying her best, but had not been given "a fair chance to even learn, you know, to be a manager," and that Johnson "thought that [Rosa] was doing her best . . . with what she had." Further, Johnson volunteered to Pigati that, "some of the other people had come to me and complain[ed] about [Rosa] as a manager." Pigati asked who these people were, and Johnson mentioned "Minal and Ed Bardwell . . . and Becca Garrett."

According to Johnson, Pigati took notes on her computer documenting Johnson's answers. Johnson also testified that as she was leaving the interview, Pigati reiterated that she "will be contacting everybody else and just keep this, you know, don't talk to anybody else on the team."[16]

Pigati conducted a similar closed door meeting with Bardwell. As she had with Johnson, Pigati asked Bardwell not to discuss the contents of their meeting with anyone else.

In July 2010, Ray Akers replaced Ellen Rosa as enrollment counselor manager for the grad team. During July, Akers held two meetings with the members of the grad team, which meetings included an open discussion of the team's frustration surrounding quotas and the quality and number of leads. Johnson's testimony suggests that the team received a similar response from Akers as they had from Rosa and Schnell, with Akers saying that he was going to work on getting better leads and that the team should continue to work hard to meet the quotas.

At some point in the middle of July, Chanelle Ison held another meeting with the grad team, and included Nicolette Boessling, director of enrollment and an admitted supervisor. During the meeting, Ison gave the team the bad news that the quotas could not be changed, and that they would not be able to get additional degree programs to supplement the existing ones they had in criminal justice and Christian studies. Also during the meeting, Ison informed the team of a new scheduling policy where one or two members of the team would need to cover late night shift hours every evening during the week. Some members of the team indicated their opposition to working any late shifts at all, but Ison stated that if team members did not volunteer for such shifts, then the shifts would simply be assigned. Johnson suggested a modified night shift system, whereby the team members could split up the night shifts, so that no team member would need to work the night shift more than 2–3 days a week. However, Ison denied this suggestion out of hand.

Apparently the discussion became somewhat heated. Bardwell, who had indicated, along with several other employees, that they were unable to work the night shift, voiced his displeasure with Ison's adamant refusal to allow the team from trying to split up the schedules. He said, "Why can't we do that if this is our meeting and we're getting the shift covered. Why can't we do that?" According to Bardwell, "We went back and forth and everyone looked at me and her. Me and Chanelle [Ison] went back and forth, and we just kind of diffused it a little bit. And, she made the final decision that we could not do that." While Bardwell testified that he was the "most vocal" of the enrollment counselors about not being able to work a night shift, he admits that others "did voice their opinions as well." Although he testified that he could not recall specifically which counselors were vocal at the meeting, he acknowledged that, "Everyone, you know, started chiming in. So it was a barrage of individuals that went back and forth."

According to Bardwell, later that day he spoke with Nicolette Boessling privately. He told her that despite being very vocal at the meeting, "My intentions were all good. They were not anything beyond that." Boessling said, "Okay, no problem."

Bardwell then met privately with Ison and reiterated that he did not want her "to get the wrong impression," and that his "intentions were good." He mentioned the suggestion that the team members split up the night shifts, and that he felt as long as they got the shifts covered, that should be adequate. However, Ison said that she thought he had acted "a little disrespectful because this is the second time it's happened." Bardwell replied that, "I'm not trying to be disrespectful or anything. I'm just here to let you know that I'm not trying to do anything beyond being a good person and being a good employee." According to Bardwell, before the meeting ended, Ison mentioned that the grad team was "the most opinionated team, kind of like a hard case or a hard chip." That was the end of their conversation. [17]

A few days after the team meeting, Johnson approached Ray Akers and mentioned that she felt the new night shift policy was "affecting a lot of people on the team," and she "didn't think that [the University] should request us to have to work late." Johnson told Akers about her suggestion that the team members share the late shift during each week, and of the rejection from management. Akers replied, "That's what management wanted to do, and we had to just follow policy. There wasn't a lot he could do because we had to cover the qualifying center."

It is now appropriate to discuss the facts leading up to the termination of Edwin Bardwell. These events mainly concern the relationship and interaction between Bardwell and the Reverend Gary Dean of Texarkana, Texas. While it is unclear exactly when the communication between these two men began, the earliest correspondence in the record is an email from Dean to Bardwell dated February 25, 2010, with Dean's attached college transcript. Although not expressed in the email, it is clear from its content that there were earlier communications wherein Dean had indicated an interest in pursuing a graduate degree in Christian studies. In the existing email, Dean makes mention of 5–6 potential students from his church that would

[17] It is alleged in complaint pars. 4(j)(1) and (2) that these statements by Ison constituted a violation of Sec. 8(a)(1) of the Act.

"like to see more about your programs." Further he says, "Pastor is very interested in a school at our church and would like to know what the requirements are?" (GC Exh. 24.)

Bardwell testified that in an earlier telephone conversation, Dean had expressed an interest in attending Grand Canyon University for a Christian studies graduate degree, and had also raised the issue of the University establishing a satellite campus at his church. While not entirely clear, Bardwell seems to testify that his reputation as established by previously working with various churches was what led Dean to contact him and raise the issue of a satellite campus.

Dean did subsequently enroll in a masters' degree program in Christian studies, and he and Bardwell communicated frequently, according to Bardwell, on an almost weekly basis. In the record is a copy of an email from Dean to Bardwell dated July 19, 2010. The subject line of the email is, "Off site campus." The email reads as follows: "Ed, when I started looking at GCU you and I had a conversation about the above subject. You told me that the best thing to do was to enroll me first then we would establish my satellite campus. That has not happened and I am starting my third class. My church has voted to do this campus and to open a Christian home schooling academy. I need to talk to you as soon as possible, Please call my cell 903–319–3521 before 5:00 pm Central Time. Thank you Rev. Gary G. Dean Sr." (GC Exh. 25.)

In response to counsel for the General Counsel's questions about this specific email, Bardwell stated that he "made no promises" to Dean regarding the establishment of a satellite campus and that he never told Dean that he had the authority to establish one. Bardwell stated that he never told Dean that if he wanted to get a satellite campus then it would be better if he was enrolled first as a student. Further, on cross-examination, Bardwell testified that Dean was the one who said "he wanted to take the class first himself because he wanted to take those classes first so he could see what the program was about to enlighten the Christian experience through his coursework before he wanted to give it approval."

Bardwell does admit, however, to telling Dean that he was attempting to do some "fact finding" to see whether it would make business sense to open a satellite campus at that particular church. He stated that he also told Dean that, "You need at least 30, even more, students to have a satellite campus." He testified, "That information I [knew] because I was an outside sales representative." Bardwell also told Dean that, "If you can do that, I'll feel comfortable going to the higher-ups," but, additionally, he allegedly told Dean that if the "higher–ups" denied the request, then there would be no satellite campus. The information that Bardwell gave to Dean was something that he acknowledged telling other pastors during the time period that he worked as an outside sales representative. He denied that he ever told Dean that Dean first needed to enroll in an online program himself before Bardwell would present the satellite campus idea to management.

Bardwell spoke to Dean on multiple occasions between his receipt of the July 19 email and August 18. Bardwell claimed that he asked Dean a number of times whether he had 30 or more students to enroll, but Dean was unable to produce such a list. On August 19, 2010, Bardwell and Dean had an email exchange in which Dean mentioned that there was "newspaper coverage for Grand and [we] are receiving calls daily. I need your help please." (GC Exh. 26, Bates Stamp 018.) Admitted into evidence were several pages from the "Texarkana Gazette," where under the heading "Church News" appeared the following: "Main Street Church. . . . The pastor is the Rev. Gary G. Dean Sr. They also offer American Christian Academy II, a home school program, for grades K-12 and university classes via satellite from Grand Canyon University, call 903–319–3521." (GC Exh. 27.) (Emphasis added by the undersigned.)

Bardwell testified that he had not been notified prior to Dean's August 19 email that a newspaper advertisement had been placed in a local Texarkana publication or that Dean was planning on doing so. According to Bardwell, in his telephone conversation with Dean on August 19, after receiving Dean's email with the mention of the "newspaper coverage," Bardwell informed Dean that since "[Dean] didn't have 30 students, so there's no way I would be able to even think about going to the higher-ups." This conversation, if it occurred, was not recorded, apparently because the call was not made using the University's phone system.

According to Bardwell, he had additional phone conversations with Dean following the August 19 email, but he is uncertain how many or when they occurred. Dean is very vague regarding these calls. While some of these conversations were made using the University's phone system, it is important to note that Bardwell admitted that some of the calls were also made using his personal cell phone. Such calls, of course, could not be recorded through the University's Quality Assurance System. He claimed that other enrollment counselors also occasionally used their personal cell phones to call students, and that the reason this was done was so that the parties felt "more freely comfortable." When asked by the undersigned why using the cell phone would make him feel more comfortable, he admitted that it was because management could not listen to the call, but also because "some students even want you to talk to them on the cell phone because they don't want the conversation recorded."

Bardwell testified that on August 20, he talked with Dean on his cell phone, and advised Dean that the requirement for establishing a satellite campus was to have at least 30 students enrolled. Dean indicated that he only had about 18 students willing to enroll, which Bardwell told him was an inadequate number for a satellite campus. Bardwell recalled another phone conversation with Dean on August 30, again on his cell phone. Dean indicated that he was still interested in establishing a satellite campus at his church and was trying to attract enough students to meet the University's requirements. This was the last conversation between Bardwell and Dean, prior to Bardwell's termination.

On cross-examination, Bardwell was asked again about why he used his personal cell phone in conversations with Dean, specifically in the conversation where Bardwell claimed that he told Dean that Dean needed at least 30 potential students before the University would consider establishing a satellite campus.

In response, Bardwell continued to say it was so that he could talk with Dean "a little more freely." At that point, the undersigned specifically asked Bardwell if by "a little more freely" he meant anything other than management would not be able to record the call. His answer was not totally responsive to the question, but he did say that using his cell phone allowed him to "talk to students a little bit more direct and a little bit more stern and more, just in general of the relationship that we build."

At some point, the University, through its Quality Assurance System, became aware of some of these conversations between Bardwell and Dean, at least those that were recorded from the University's phone system. Entered into evidence was the transcript of a phone conversation between Dean and Bardwell, which occurred on August 20, 2010. (R. Exh. 10, Transcription of Voice Mail Message-#1.) Dean made the call to Bardwell, and he tells Bardwell, "Well when I first contacted you about the University my concern was to open a satellite of Grand (sic) University here in Texarkana." Bardwell responded, "Uh huh." Dean continued, "And you said that would be no problem, blah, blah, blah, blah, and, but you wanted me to sign up for classes first." Again Bardwell responded, "Uh huh." Later in the conversation, Dean says, "And now I've got my new church up and running. . . . And we want to be able to put this satellite in and I need some help." At that point, Bardwell tells Dean, he will call him right back, from what apparently was his cell phone. On cross-examination, counsel for the Respondent attempted to get Bardwell to say what he meant by the term "Uh huh," suggesting that Bardwell was in effect agreeing with the statements Dean was making. Bardwell's responses to counsel were evasive and frankly made no logical sense. Bardwell was, in any event, refusing to admit that he had acquiesced to Dean's statements. Under cross-examination, Bardwell does admit that after the call on the University's system, the one that was recorded, that he called Dean on his personal cell phone, and while he is somewhat contradictory, he ultimately acknowledges making the cell phone call "shortly after."

A call on the University's system on August 30, 2010, between Dean and Bardwell was also recorded and admitted into evidence. (R. Exh. 11, Transcription of Voice Mail Message–#3.)[18] Dean placed the call to Bardwell, during which call Bardwell asked him how his classes were going. Dean responded, "Well, that's why I'm calling you, we're trying to get the satellite set up, satellite campus . . . . Right now I've got 18 names and I'm still working on it and I'll have 30 by the end of the week." Bardwell asks Dean, "All on which degree programs will the18 want to go for? Dean responds, "I've got them from bachelors to masters to Ph.D." The conversation ends with Bardwell telling Dean that he will be sending him some information and literature by email. However, Bardwell testified that, once again, he followed the phone conversation on the University's system with a call from his personal cell phone. According to Bardwell, he repeated for Dean the "parameters" for establishing a satellite campus, presumably a minimum of 30 students, to which Dean replied that "he was trying to get enough students to submit." That was apparently the last phone conversation between the two men.

It is Bardwell's testimony that he never told Dean that Dean needed to register for class before there could be any consideration of a satellite campus on his church; that he never told Dean that he had the authority to establish a satellite campus; and that he never promised Dean that a satellite campus would be set up if Dean was able to produce 30 students willing to enroll.

According to Bardwell, he merely told Dean that if a minimum of 30 students were willing to enroll at the University that he would be willing to take the matter of a satellite campus up with management. Bardwell acknowledges that he had no authority to establish such a campus on his own initiative, but continues to claim that he had the authority to talk about such matters with churches under his continuing "dual role" as an enrollment counselor and outside sales representative (OSR).

Some time at the end of August or early September, Ray Akers, enrollment counselor manager, and Nicolette Boessling, conducted a "one-on-one review" where they "would just spot check different employees on the team." According to Akers, they would select a 24-hour period and randomly select three or four calls made during that period by the employee. During one particular spot check they listened to one of Bardwell's conversations with Reverend Dean that included a discussion of potentially setting up a satellite campus. Akers defined the reaction of both of them as being "very surprised." Boessing told Akers that "she would take it from here."

Sarah Boeder, senior vice president of online operations, testified that after reviewing two calls that Bardwell had with Dean on August 20 and 30, 2010, a decision was made to terminate Bardwell. Boeder was the ultimate decision maker, and decided on termination because: (1) Bardwell failed to follow the extensive process needed to establish a satellite campus, and (2) and he had made numerous misstatements to Dean, even though all enrollment counselors, including Bardwell, had recently completed a compliance training program. Management felt that Bardwell had represented to Dean that he had the authority to set up a satellite campus and that doing so would be "no problem," once Dean enrolled at the University, which he did. Boeder testified that Bardwell had absolutely no authority even to discuss the establishment of a satellite campus, let alone lead a prospective student to believe that a campus in Texas was a realistic possibility. According to Boeder, the process to establish a satellite campus takes months, if not years, is very complicated, and involves numerous individuals and approvals from various internal University offices and state agencies. As of the date of the hearing, the only satellite campus located outside the State of Arizona was in Albuquerque, New Mexico. State approval is necessary before the University can begin a satellite campus in a given state.

Near the end of the work day on September 2, 2010, Bardwell met with Rhonda Pigati and Chanelle Ison. According to Bardwell, Pigati informed him that he had been terminated for "setting up satellite campuses." He was just "discombobulated" with the news, as he claimed he had done no such thing. Ison stated that they had listened to several phone conversations

[18] On the record, the parties agreed that this transcript should have been labeled as, Transcription of Voice Mail Message-#2.

with Reverend Dean and determined that he had made promises that he had no authority to make.

Bardwell said that he had done nothing wrong and asked them to call Dean and talk with him directly. Bardwell defended himself, saying that he was not setting up satellite campuses, but only offering "information to see if this was something we can even consider, and that I was going to present to the higher ups, management, and business development to see."

Bardwell argued that he had been given "dual role authority" by Jacob Mayhew.[19] He testified that he told this to Pigati and Ison, but they did not care, and they refused to contact Dean. The Involuntary Termination Request for Bardwell was approved by Boeder. It gives a number of reasons for termination, including fraudulent activity; making misrepresentations about the Respondent's policies or admission requirements; lack of integrity or unethical behavior; conflict of interest; and compliance violations. (GC Exh. 3.) In reviewing the termination document and its attachments, it is fairly clear to the undersigned that the Respondent's managers believed from the two phone calls that were recorded and from the email communication between Dean and Bardwell, that Bardwell was using Dean's desire to have a satellite campus at his church as a way of getting Dean, and potentially other students, to enroll at the University. In the Respondent's view, Bardwell was misleading Dean into believing that Bardwell was likely to arrange for such a satellite campus, once enough students who were affiliated with the church enrolled with the University. It appeared from the correspondence that this was the reason that Dean had enrolled, and it was fairly obvious that Dean was attempting to get others, perhaps as many as 30, to also enroll. The University managers contend that Bardwell had absolutely no authority to establish such a satellite campus, or even to raise that issue with Dean. Accordingly, that was the Respondent's stated reason for terminating Bardwell.

Prior to firing Bardwell, there was apparently no effort to contact Dean, as the Respondent did not indicate having done so. The Respondent relies almost entirely on the correspondence between Dean and Bardwell, along with the recorded two phone calls. Further, counsel for the Respondent suggests strongly that the reason Bardwell used his personal cell phone to call Dean was so that the University would not have the capacity to learn of Bardwell's unauthorized and fraudulent promises made to Dean. It should be noted that Dean was not called as a witness by either party at the hearing.

3. Gloria Johnson

Gloria Johnson began her employment at Grand Canyon University on August 31, 2009, and remained employed there as an enrollment counselor until her termination on August 2, 2010. As noted earlier, she was a member of the grad team.

According to Johnson, enrollment counselors were required to send an email application packet to a lead interested in enrolling as a student, which packet included documents that the student would have to fill out in order to complete the application process. Once the student filled out the enrollment application materials fully, those completed materials were returned to the enrollment counselor who would then be able to print out the documents.

On July 15, 2010, at 7:38 am, Johnson received a call at work from Bessie Miller, a lead who had indicated an interest in enrolling as a student in the Christian studies master's degree program. Miller was calling in order to find out whether Johnson had received her completed electronic application materials. Johnson had received the application. However, the transcript request form as originally filled out by Miller had the word "Other" in the space set aside for the applicant's "Name of College/University." Also, the space for the "Campus Attended" was left blank, and Miller had listed NC as the State. Miller had listed the dates attended and the degree earned.

Johnson briefly looked over the application and indicated to Miller that it looked complete, except that "she didn't put the school in her transcript request form." Miller responded that she was unable to find her former school in the "dropdown" menu on the transcript request form webpage. Johnson then instructed Miller to check the dropdown menu again just to make sure that she was not mistaken. After Miller was unable to find it for a second time, Johnson told her, "What I can do is I'll talk to my manager to see if it's okay to write the school in because [you] signed everything." She then told Miller, "I want you to give me your permission on the phone because they record everything we say." Miller granted Johnson permission to write on her application both the name of the school that she had attended and the location of the school.

Johnson testified that she then put Miller on hold and took the printed transcript request form over to Jacob Husband, a team lead for the grad team. She showed him the form and asked if it was "okay if I write the name of the school on here and the campus Bessie Miller attended because this school is not on the dropdown." Husband replied that he was not sure if the Office of Academic Records would accept the form with the written information, and instructed Johnson to speak to their enrollment counselor manager, Ray Akers.

It should be noted that Human Resource Manager Rhonda Pigati testified that after Johnson was terminated she spoke to Husband regarding this matter because his name had been mentioned in Johnson's post-termination explanation letter. Pigati stated that Husband told her that he "didn't remember having a conversation like that," and if he had been asked that question he would have told Johnson that she should "absolutely not" write over the document.

In any event, after her alleged brief conversation with Husband, Johnson testified that she immediately approached Akers at his desk, showed him Miller's transcript request form and asked him for permission to "write the name of the school and the campus that Bessie [Miller] attended on the transcript." It is important to mention that according to Johnson, at the point that she showed Akers the transcript request, she had made no markings on the document. She testified that Akers asked her what she was "trying to do," and, after receiving an explanation that she just wanted to write the name of the school, campus

[19] By this statement I assume that he was referring to his contention that when he returned to the job of enrollment counselor, Jacob Mayhew had allegedly allowed him to continue his work with churches in the capacity of an outside sales representative (OSR).

attended, and specific state on the form, he told her that it "should be okay." However, Johnson noted that as she was walking away from Akers' desk he stopped her and asked her, "What is it you're doing again?" Johnson repeated everything that she wanted to do, and that she would not be changing anything else on the form, nor was she signing Miller's name. Hearing this information, Akers again granted permission. It should be noted, however, that when Akers testified, he did not recall having a second conversation with Johnson on this date regarding the form.

By the time Johnson had returned to her desk, Miller had hung up. Johnson called her back, leaving a message, which Miller returned immediately. During that conversation, which lasted roughly 5 minutes, Johnson told Miller that as her supervisor had given permission, she was going to write in Miller's college's name, the campus attended, and the location on the form. Miller again indicated that was fine with her, and she gave Johnson the information that the college that she had attended was North Carolina College of Theology and that the location of the campus was Baltimore, Maryland. Johnson then apprised Miller that she would submit her application packet, including the transcript request form.

Akers testified that sometime after Johnson had approached him on the morning of July 15, but before July 16, he went to discuss the Bessie Miller situation with his manager, Mike Rasmussen. After his conversation with Rasmussen, Akers realized that neither of them had the ability to listen to the phone conversation between Miller and Johnson, because Johnson was not officially on Akers' team.[20] Therefore, Rasmussen suggested that Akers speak with Rhonda Pigati, who had the ability to listen to the recorded call.

According to Akers, as he was getting ready for work on July 16, "something stuck out to me about the form," and "it occurred to me that it was a different color ink, it was like a purple color on the page." Because he knew that faxes should not have different colors, he decided to approach Johnson again in order for her to recount the situation. He went to Johnson's desk that morning and asked if she could repeat what she had asked him the day before. Johnson reiterated what she had requested and Akers replied, "Okay, next time just go ahead, send it back to the student, have the student write it in and process it."

Rhonda Pigati, a human resources manager, testified that some time after July 15, 2010, Ray Akers approached her and discussed the interaction that he and Johnson had had regarding the Bessie Miller application. Akers told Pigati that he wanted to share with her "something that was on his mind" from his conversation with Johnson. Akers set out the specifics of the interaction that occurred between him and Johnson regarding Miller's transcript request. However, what is not clear to the undersigned is whether Akers told Pigati that when he first saw the transcript form it did or did not contain the handwritten notations.

In any event, Akers testified that he and Pigati then retrived the phone calls that Johnson had made on the morning of July 15 and listened to them. According to Pigati, Akers admitted that after Johnson had shown him the transcript form and asked him if it was okay to send it on for processing with a handwritten correction, that he had told Johnson that he "didn't think the handwriting would be a problem." However, according to Pigati, Akers claimed that the next day when he spoke to Johnson again, and realized that what she had done was to write in the information on the form herself, he had told Johnson that, "You can't do this. You cannot change documents that students have provided in any way, shape or form. They cannot be altered." Pigati testified that she told Akers that this was a very serious matter, as Johnson had altered a student's document, and it did not matter that Miller had given her permission for Johnson to do so.

Akers' testimony was difficult to comprehend. He appears to suggest, without definitively saying so, that he was confused when originally approached by Johnson with Miller's transcript request. He seems to be suggesting that he thought that Miller had made the handwritten notations on the form herself, not Johnson. He apparently thought that would not be a problem, and only realized that it was Johnson who had made the handwritten notations once he recalled the different color ink on the form. By the time that he testified, it was clear to him that Johnson had made the additions to the form, and, so, he understood that this was a violation of the University's "zero tolerance non-compliance policy."

On August 2, 2010, Johnson was asked to meet with Rhonda Pigati in her office. When Johnson arrived in the office, both Pigati and Akers were waiting for her. Pigati asked Johnson if she remembered the situation regarding Bessie Miller's application materials. Johnson replied that she did, and Pigati stated that Johnson was going to be terminated for writing on the transcript request form. Johnson then pointed to Akers and stated that, "He told me I could do it." Akers then responded that "he didn't understand what [Johnson was asking him.]" Johnson testified that she was shocked and that she asked Pigati, "So you're telling me I'm being terminated for doing something that a manager said I could do?" According to Johnson, Pigati responded that Akers "didn't understand what [Johnson] said." That essentially completed the meeting.

The involuntary termination request form for Johnson indicates the following: "On July 15, 2010 Gloria received an (sic) Transcript Request Form from a student in which "other" was entered under the Name of College/University. While speaking with the student over the phone on the same day, Gloria realized this area needed the name of a University so she told the student she would add this information (North Carolina College of Theology, Baltimore MD) to the form on the student's behalf. Although Gloria asked the student for permission to add this information, making any additions/changes to any student documents is a violation of GCU's Standards of Performance 'Falsification of any student paperwork and/or student signtures or posing as a student as part of internal or external communication.'" The final approval of the termination was by Nikki Mancuso and Sarah Boeder. (GC Exh. 20.)

In his posthearing brief, counsel for the General Counsel argues that Johnson did not falsify any information or pose as a

[20] Apparently at the time, Akers was a temporary manager for the grad team, and not "officially" the manager.

student as alleged in the termination request form. In rebuttal to the allegations in the Termination Request counsel states: (1) Johnson did not write down any information on the transcript request form that was false; (2) Johnson did not sign Miller's name on the form; (3) Johnson did not pose as a student; and (4) Respondent knew that its supervisor had granted Johnson permission to help the student by writing on the transcript request form.

Johnson testified that later in the week that she was terminated, she "typed up this long letter," which she sent to "whoever [she] could find in upper management." This letter contained her story about the events leading to her termination, "everything . . . that I talked about and what happened step-by-step." In response she received a call from Patti Stoner, an alleged supervisor, who allegedly told Johnson that the University had done an in depth investigation and had determined that Johnson had made the changes on Bessie Miller's Transcript Request form before she sought permission from Akers to do so. However, Johnson strongly asserts that this is not accurate, and that, in fact, she only made the additions to the form after Akers gave his permission, twice.

Obviously, the parties disagree over whether Johnson made the changes to the form before getting permission to do so. Akers testified that when he saw the form, it had different color ink on it, meaning that, if credible, the changes had already been made by Johnson. Yet, it is undisputed that Akers still gave Johnson permission to make the changes, despite apparently seeing that the changes were already made. Of course, Akers subsequently claimed that he misunderstood what Johnson was asking, and offers this as an excuse for having told her it was okay to make the changes. I will have more to say about this incident in the analysis section of this decision.

4. John Young

As noted earlier, John Young, III, filed an unfair labor practice charge against the Respondent, as captioned above, which has been consolidated with the other cases captioned above into the complaint that is before the undersigned. Young did not appear to testify at the hearing, and counsel for the General Counsel offered no explanation for Young's absence. The only evidence offered by the General Counsel in support of the allegations involving Young was the testimony of human resource manager and admitted Supervisor Linda Lair. [21]

Under examination from counsel for the General Counsel, Lair testified that Young was employed by the Respondent as an outside sales representative in the military division. Apparently around January 2010, Lair was investigating a complaint that an employee Jensen had filed with the human resources department alleging an improper evaluation that Jensen had received and that resulted in a pay reduction. John Young was believed to have been present at a meeting between Jensen and his supervisor, during which meeting Jensen claimed to have been promised a raise by his supervisor. Lair testified that she interviewed Young regarding Jensen's complaint. Counsel for the General Counsel asked Lair whether "during your investigation, you had told Mr. Young not to discuss what was said between you and he, correct?" Lair responded, "I don't remember telling him that during our conversation, no." After some further dialog, counsel's follow up question was, "So it would have been your practice to have told Mr. Young during this meeting with him to keep what was said between you and he confidential, correct?" Lair responded, "Correct."

Lair also testified that Young was no longer employed at the University, having been terminated. Young filed his own complaint with human resources regarding his termination. Lair investigated that complaint and interviewed Young apparently around March of 2010. According to Lair, her interview with Young involved whether Young had had a physically altercation with, or improperly touched, another employee. Counsel for the General Counsel asked Lair, "And, before the meeting ended, you had told Mr. Young not to talk about what was said between you and he with anyone, correct?" Lair responded, "I don't remember that." Counsel followed up with, "But this was an investigation that eventually led to Mr. Young's termination, correct?" Lair said, "Correct." Counsel then asked, "And, certainly, when you're investigating an allegation that could lead to termination, you want your investigation to be confidential, correct." In response, Lair said, "Correct."

As I indicated above, counsel for the General Counsel offered no other evidence of any kind, documentary or testimonial, to support these specific complaint allegations.

III. LEGAL ANALYSIS AND CONCLUSIONS

A. Written Rules

In paragraph 4(b) of the complaint, the General Counsel sets out the Respondent's written Electronic Communications Policy, which regulates employee usage of the Employer's email system, among other things. This policy is outlined in the Human Resources Policies and Procedures manual under the subsection for compliance, which has been in effect since November 1, 2008. (GC Exh. 5.) The General Counsel alleges in paragraph 5 of the complaint that by its conduct in maintaining the Electronic Communications Policy, the Respondent is in violation of Section 8(a)(1) of the Act. However, neither in his posthearing brief, nor during the hearing did counsel for the General Counsel ever specify in what way the mere existence or maintenance of the rule as written was unlawful. Counsel for the General Counsel did contend that the application of the rule was discriminatory and, thus, unlawful, as allegedly the Respondent applied it disparately in order to preclude protected concerted activity. However, regarding its mere existence or maintenance, I am left to ponder this issue without a clear position from the General Counsel.

Earlier in this decision I set forth in detail the language of the rule in question. In considering that rule, which is clearly designed on its face to limit the use of the Respondent's electronic communications system to university business only, the following clause seems questionable: "Email should be used for the purpose of University business. Inappropriate use includes, but is not limited to the following: Emails considered discriminatory or harassing in nature." (GC Exh. 5.)

[21] In response to a question from the undersigned, counsel for the General Counsel indicated that the testimony from Lair involving Young was intended to support complaint pars. 4(e)(1) and (2), and (4)(f)(1) and (2).

It was the testimony of numerous witnesses that the University's email system was in fact frequently and regularly used by employees for personal matters unrelated to university business. The Respondent did not seriously challenge this testimony. In fact, there was evidence in the record that employees who management felt had abused the privilege of using the email system for personal use were told that because of their abuse they would no longer be permitted to use the system for personal communication. Therefore, as the email system was in fact used by employees for matters unrelated to university business, the question before me is whether the language above is on its face unlawful.

In determining whether the existence of specific work rules violates Section 8(a)(1) of the Act, the Board has held that, "the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights" *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Further, where the rules are likely to have a chilling effect on Section 7 rights, "the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement." Id. See also, *Blue Cross-Blue Shield of Alabama,* 225 NLRB 1217, 1220 (1976).

The Board has further refined the above standard in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004), by creating a two step inquiry for determining whether the maintenance of a rule violates the Act. First, if the rule expressly restricts Section 7 activity, it is clearly unlawful. If the rule does not, it will nonetheless violate the Act upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647; See *Northeastern Land Services, Ltd*., 352 NLRB 744 (2009) (applying the Board's standard in Lutheran Heritage Village, supra at 647.)

Regarding the clause at issue before me, the Respondent's rule that inappropriate use of the University's email system includes those emails considered "discriminatory or harassing in nature" does clearly not restrict activity protected by Section 7. Moreover, there is no evidence that that specific language in the rule was promulgated in response to protected concerted activity, or as written was applied to restrict the exercise of Section 7 activity. Accordingly, the only question remaining is whether the Respondent's employees would reasonably construe the rule to prohibit Section 7 activity. I think not.

The terms "discriminatory" and "harassing" are not difficult to understand. Those terms are not ambiguous or confusing. The average person should certainly understand them, and would know that sending messages that are discriminatory or harassing should be avoided. I see no reason why any reasonable employees would consider that concerted conduct involving their terms and conditions of employment would be viewed by management to be discriminatory or harassing. Therefore, I do not believe that any of the written language as contained in the Respondent's electronic communications policy would chill employee Section 7 activity. Accordingly, I find that on its face and as promulgated by the Respondent, that policy, as set forth in paragraph 4(b) of the complaint, does not, per se, violate Section 8(a)(1) of the Act.

However, there remains one further issue regarding the whole of the Respondent's electronic communication policy that must be considered, that being its application, and whether it is being discriminatorily applied. In paragraphs 4(k) and (5) of the complaint, it is alleged that on February 23, 2010, at her termination interview, Shelly Campbell was informed by human resources manager Linda Lair and enrollment counselor Rosa that counselors are not allowed to ever send out nonbusiness related emails.[22] However, according Campbell's unrebutted testimony, it was enrollment counselor Rosa who made the statement and not Lair. In any event, the issue of a January 20, 2010 email that Campbell had received from another counselor and then forwarded to a student and fellow counselors was one of the issues raised at her termination interview. [23]

The author of the email was ridiculing the Respondent's recently announced policy change regarding international leads. This policy change was a source of concern to the grad team counselors who did not like having to surrender to other counselor teams leads involving international students. Campbell had merely passed the mocking email on to fellow grad team members, and also had inadvertently sent it on to a student. Campbell's Termination Request form makes mention of this incident (GC Exh. 7), and as testified to by Campbell, it was brought up during the termination interview.

As I have noted, numerous witnesses testified that employees with regularity used the Respondent's email system not only for business purposes, but also for personal reasons. I find Campbell's unrebutted testimony credible that Rosa said to her on February 23, 2010 that "[counselors are] not allowed to ever send out non-business related emails," when referencing her January 20, 2010, forwarding of the email ridiculing the Respondent's lead policy for international students. Therefore, I must conclude that the Respondent was disparately applying its electronic communications policy to prohibit employee emails that related to the Respondent's policy on leads. The concerns that the grad team counselors frequently shared with each other regarding leads in general, and in this instance specifically leads for international students, clearly involved wages and working conditions, and, as such, constituted protected concerted activity.

Accordingly, I find that the Respondent's conduct, by Rosa's statement, on February 23, 2010, constituted an unlawful disparate application and enforcement of the Electronic Communications Policy. I, therefore, conclude that it was in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(k) and 5.

Complaint paragraph 4(c) alleges that the following language maintained in the Respondent's employee counseling statement is overly-broad and discriminatory: "Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely

[22] At the hearing the complaint was amended to add Rosa's name to this paragraph.

[23] The question of Campbell's discharge will be discussed in detail later in this decision.

confidential and may not be discussed with any other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources." The evidence is undisputed that such language appears in the respondent's employee counseling statement, directly above the line on which a counseled employee signs his/her name. (GC Exh. 14.)

The Board has held that "confidentiality" rules, which expressly prohibit employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment, restrain and coerce employees in violation of Section 8(a)(1) of the Act, regardless of whether the rule was unlawfully motivated, or even enforced. See *Lutheran Heritage Village-Livonia*, supra; *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004) (handbook provision a violation on its face where confidential information is defined as "wages and working conditions such as disciplinary information, grievance/complaint information, performance evaluations [and] salary information"); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 fn. 3. 291 (1999) (handbook provision prohibiting employees from disclosing "confidential information regarding . . . fellow employees" a violation.)

In some circumstances, an employer may require that employees questioned during an investigatory interview keep the matters discussed confidential, where the provision is limited in duration to the period of the investigation and is necessary in order to maintain the integrity of the investigation. In *Desert Palace, Inc., d/b/a Caesar's Palace*, 336 NLRB 271 (2001), the Board reversed an administrative law judge and found that the employer's need to maintain the confidentiality of an on-going drug investigation was a "substantial business justification" that justified the intrusion on its employees' exercise of Section 7 rights. However, the Board reached a different conclusion in *Phoenix Transit Systems*, 337 NLRB 510 (2002), finding in agreement with the administrative law judge that the employer violated the Act by maintaining a confidentiality rule prohibiting employees from discussing their sexual harassment complaints among themselves. In reading these cases and their progeny, it seems to me that the Board is attempting to strike a balance between the employees' Section 7 right to discuss among themselves their terms and conditions of employment, and the right of an employer under certain limited circumstances to demand confidentiality. The burden is clearly with an employer to demonstrate that a legitimate and substantial justification exists for a rule that adversely impacts on employee Section 7 rights. In any event, there is no credible or probative evidence in the matter at hand that the Respondent ever limited the time period or scope of its confidentiality rules, whether written or oral. Nor has the Respondent established a legitimate justification for such a policy.

In the matter before me, the wording in the Employee counseling statement is clear and unambiguous. It states that the issues raised in the counseling session are "considered extremely confidential," and prohibits the counseled employee from discussing the counseling with, among others, "current or former employees of Grand Canyon University." As the cited case law shows, the Board has found such confidentiality provisions to be unlawful. Employees have the right under the Act to communicate with fellow employees, past and present, as well as with other individuals concerns that they have about wages, hours, and working conditions. Those include issues related to disciplinary actions, including the counseling of employees. Employees engaged in such conversations are involved in the most basic form of concerted activity, which is protected under the Act.

As a restriction on employees' Section 7 activity, the Respondent's confidentiality clause in the employee counseling statement is on its face a per se violation of the Act. Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraphs 4(c) and 5.

B. Oral Promulgation of Rules, Threats, and Interrogation

As was discussed in detail earlier in this decision, on December 16, 2009, enrollment counselor Shelly Campbell was counseled by supervisors Boeder and Schnell. This counseling session primarily dealt with a phone conversation between Campbell and a prospective student occurring on December 2. According to Campbell's unrebutted and credible testimony, at the end of the counseling session both Boeder and Schnell cautioned her not to discuss with anyone the alleged infractions of the Respondent's policies that the managers had raised with her. Ultimately on December 30, 2009, Campbell was given a written employee counseling statement to sign that contained the exact confidentiality language, which I concluded above constituted a per se violation of the Act. (GC Exh. 6)

It is alleged in paragraphs 4(d) and 5 of the complaint that on December 30, 2009,[24] the Respondent, by Sara Boeder, orally promulgated and has since maintained an overly-broad and discriminatory rule prohibiting employees from talking to each other about their terms and conditions of employment, including counseling about quality assurance issues, in violation of the Act. From the record evidence, it appears that this admonition to Campbell came from both Boeder and Schnell and actually occurred at the counseling session on December 16, 2009. In any event, as I have indicated above, such a warning or statement, whether written or oral requiring employees to keep confidential and not discuss with others the substance of a counseling sessions is an unlawful restriction on the Section 7 rights of employees to engage in the concerted activity of having such discussions. It is axiomatic that the right of employees to discuss their wages, hours, and working conditions, including those matters discussed at a counseling session, is protected under the Act.

By the actions of the Respondent through its managers' oral statements on December 16, 2009, it was promulgating an unlawful rule prohibiting employees from talking with each other regarding their terms and conditions of employment. I find such conduct, as alleged in complaint paragraphs 4(d) and 5, to constitute a violation of Section 8(a)(1) of the Act.

The complaint alleges in paragraphs 4(e) and (f), and their

[24] At the hearing, counsel for the General Counsel was permitted to amend the complaint to reflect this date.

respective subparagraphs, that Linda Lair, on behalf of the Respondent, promulgated unlawful rules and threatened employees with unspecified reprisals regarding their protected concerted activity. These allegations all involve Charging Party John Young, a former employee of the Respondent. However, as I noted earlier, Young did not testify as a witness in this case, and counsel for the General Counsel never offered an explanation as to why that was so. In fact, the only evidence offered by the General Counsel in support of the allegations involving Young was the testimony of human resource manager and admitted Supervisor Lair. Earlier in the fact section of this decision, I set forth in detail Lair's testimony.

Regarding the allegation in complaint paragraph 4(e)(1) that in January 2010 Lair orally promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing terms and conditions of employment with each other, counsel for the General Counsel questioned Lair about an interview that she conducted with Young at around that time. Counsel asked Lair if she had told Young during this meeting not to discuss what was said between the two of them. However, Lair responded, "I don't remember telling him that during our conversation, no." Subsequently, counsel asked the follow up question, "So it would have been your practice to have told Mr. Young during this meeting with him to keep what was said between you and he confidential, correct?" Lair responded, "Correct."

Similarly, the complaint alleges in paragraph 4(f)(1) that on March 3, 2010, Lair orally promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing their terms and conditions of employment with each other. Counsel for the General Counsel questioned Lair about an interview that she had with Young around that date, and counsel asked Lair, "And, before the meeting ended, you had told Mr. Young not to talk about what was said between you and he with anyone, correct?" Lair responded, "I don't remember that." Counsel followed up with, "But this was an investigation that eventually led to Mr. Young's termination, correct?" Lair said, "Correct." Counsel then asked, "And certainly, when you're investigating an allegation that could lead to termination, you want your investigation to be confidential, correct?" In response, Lair said, "Correct."

In my view, counsel for the General Counsel failed to meet his burden of proof to establish the allegations set forth in complaint paragraphs 4(e)(1) and 4(f)(1). All Lair did in response to counsel's questions was to acknowledge what her past practice had been. She specifically denied having any remembrance of telling Young that he was not to discuss the maters raised in the interviews with anyone else. Lair's past practice is immaterial. What matters is what she actually told Young. According to Lair she could not remember. As there was absolutely no evidence to the contrary, I credit Lair's testimony.

Accordingly, counsel for the General Counsel has offered no evidence, probative or otherwise, to establish that Lair made the two alleged statements orally promulgating an unlawful rule. Therefore, the General Counsel having failed to meet his burden of proof, I shall recommend to the Board that complaint paragraph allegations 4(e)(1) and 4(f)(1) be dismissed.

In complaint paragraphs 4(e)(2) and 4(f)(2), the General Counsel alleges that Lair in January 2010 and on March 3, 2010, threatened its employees with unspecified reprisals because they engaged in concerted activities. During the trial, the undersigned asked counsel for the General Counsel to identify the employees allegedly threatened by Lair. Counsel indicated John Young was the employee allegedly threatened in complaint paragraphs 4(e) and (f) and all their respective subparagraphs.

In any event, so far as I can tell, no evidence of any kind was offered by counsel for the General Counsel to establish that Linda Lair had threatened Young with any form of reprisals. Young did not testify and Lair was not questioned about, and did not testify to, making any such threats. Further, in his posthearing brief, counsel for the General Counsel is silent regarding these allegations.

Accordingly, I conclude that the General Counsel has failed to meet his burden of proof. Therefore, I recommend to the Board that the allegations in complaint paragraph 4(e)(2) and 4(f)(2) be dismissed.

It is alleged in complaint paragraph 4(g) and its subparagraphs that on April 29, 2010, the Respondent, through it enrollment counselor manager and admitted Supervisor Ellen Rosa, interrogated employees about their involvement with emails criticizing the Respondent and its policies; orally promulgated an unlawful rule prohibiting employees from discussing their terms and conditions of employment; and threatened its employees with discharge and other unspecified reprisals because they engaged in concerted activities. These allegations center around a number of individual conversations that Rosa allegedly had with some members of the grad team, as well as at a meeting with the team as a whole.

As I noted earlier in this decision, in late April 2010, an employee apparently sent an email to coworkers over the Respondent's email system criticizing supervisors Chanelle Ison and Chris Landauer. Gloria Johnson testified that at some point in late April, Ellen Rosa, the grad team enrollment counselor manager, approached her privately regarding the email that criticized Ison and Landauer. Rosa allegedly asked Johnson whether she had received this email. Johnson replied that she had received no such email. According to Johnson's testimony, Rosa admonished her that, "if I get the email, delete it and not read it," and that "whoever sent the email would be terminated," and that "if anybody else is caught forwarding the email, they would be terminated." Johnson also testified that later that same day, Rosa called a team meeting and relayed to the entire team that same information about the email that she had given earlier to Johnson.

Edmond Bardwell also recalled Rosa talking with the grad team employees about this email criticizing Ison and Landauer. He testified that she told the counselors, "They're firing individuals for forwarding this email. If you get this email, you better delete it." Bardwell claims that Rosa also asked him specifically whether he had received the email, to which he responded that he had not. Allegedly she told him individually that if he gets the email to delete it, or he might get fired.

In his posthearing brief, counsel for the Respondent argues

that there is no evidence that the email in question that criticized the two supervisors even mentioned any of the terms and conditions of employment of the enrollment counselors. However, it is axiomatic that employees who discuss among themselves their supervisors in a critical way, or otherwise, are engaged in protected concerted activity. Clearly Rosa was upset about this email, which had apparently been forwarded by certain counselors. She meant to put a stop to counselors using the University's email system to pass the message around, and she, in no uncertain terms, warned the counselors that they might be fired for continuing to do so.

The Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about suspected protected activity were coercive under the Act. *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Westwood Health Care Center*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "Bourne factors," so named because they were first set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties' relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

In my view, Supervisor Rosa unlawfully interrogated Johnson and Bardwell on April 29 when she questioned them about whether they had received a copy of the email critical of Ison and Landauer. She was their immediate supervisor, she questioned them individually, and she threatened them with possible termination if they read the email or forwarded it on to fellow counselors. Certainly her comments were coercive under existing Board law and would have reasonably chilled employees in the exercise of their Section 7 rights. Accordingly, I conclude that the Respondent, by the statements of Ellen Rosa, interrogated its employees on April 30, 2010, regarding their protected concerted activity. I find that such conduct constitutes a violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 4(g)(1).

Further, I conclude that Rosa's statements made to Johnson and Bardwell individually, and to the members of the grad team as a whole, that they could not read or forward the emails in question constituted the oral promulgation of an overly-broad and discriminatory rule prohibiting employees from using the Respondent's email system to criticize the Respondent's supervisors, a form of protected concerted activity. As I previously concluded above, the University's email system was generally available for employees to use for personal matters, as well as for University business. This was true despite the language in the Electronic Communication Policy limiting email "for the purpose of University business."

Having generally allowed, through custom and practice, employees to use the Respondent's email system for personal matters, the Respondent cannot lawfully prohibit employees from using the system to engage in protected concerted activity. This conduct by the Respondent is an attempt to restrict the exercise of Section 7 rights. Such an application of its rule is discriminatory and unlawful. *Lutheran Heritage Village-Livonia*, supra at 647; *Northeastern Land Services, Ltd*., supra. Accordingly, I conclude that by the conduct of Rosa on April 30, 2010, the Respondent has orally promulgated an unlawful rule restricting protected concerted activity in violation of Section 8(a)(1) of the Act, as alleged in complaint paragraph 4(g)(2).

Additionally, I believe that Rosa's statements to Johnson, Bardwell, and the grad team members as a whole, constituted a threat of discharge because they engaged in or may engage in protected concerted activity. She none too subtly told them that if they received the email and read it, or forwarded it on to another enrollment counselor that they would be terminated. As I have determined that the enrollment counselors who read and/or passed on the email critical of the supervisors where engaged in protected concerted activity, a threat of termination would obviously chill their exercise of Section 7 rights.

Accordingly, I conclude that the Respondent, by Rosa's statements on April 29, 2010, unlawfully threatened employees with discharge for engaging in protected concerted activity. Therefore, I find that the Respondent has violated Section 8(a)(1) of the Act, as alleged in complaint paragraph 4(g)(3).

As discussed in detail earlier in this decision, in mid-April 2010, Associate Vice President Ison had a meeting with the grad team members to discuss the recurring complaints and issues that those enrollment counselors had with the University. When testifying, Ison referred to such meetings as "Start, Stop, and Continue." The principal frustration that was raised by the counselors was the perennial issue of poor quality leads. Ison indicated that she understood their complaint and was doing what she could to get the team better leads. Also during the meeting, Bardwell proposed the idea for a "peer review" from the enrollment counselors for their managers. Ison asked Bardwell to work on producing some sort of questionnaire. He subsequently prepared such a form and gave it to Ison to review.

There was a follow up meeting between Ison and the grad team in either late April or early May 2010. During that meeting, they discussed Bardwell's earlier suggestion regarding a peer review process for managers. However, Ison indicated that a decision had been made not to implement such a peer review for managers. Bardwell voiced his displeasure with the decision, stating that it was crucial for the grad team to have a survey of managers because it would help improve morale. Bardwell testified that after the meeting, Ison approached him at his desk. As the two were walking down the stairs leaving for the day, Ison said that she was concerned because during the meeting he had been upset with her and had spoken to her in a "disrespectful" way. Bardwell replied that he was not trying to be disrespectful, and thought the meeting was "an open forum." That was the extent of the conversation.

It is alleged by the General Counsel in complaint paragraph 4(h)(1) and (2) that in late April Ison threatened employees with unspecified reprisals because they engaged in concerted activities and also threatened employees by informing them that their concerted activities were disrespectful to the Respondent. It is apparent from counsel for the General Counsel's posthearing brief that this allegation involves the discussion between Ison and Bardwell when she told him as they were

leaving for the day that he had been disrespectful towards her in arguing that the peer review survey was necessary for counselor morale. However, in my view, this conversation certainly does not rise to the level of an unfair labor practice.

Apparently Bardwell had gotten a little loud and insistent in his reaction to the University's decision not to institute a peer review survey for managers, which survey he had originally suggested. Subsequently, Ison merely mentioned to Bardwell that she thought his reaction had been disrespectful towards her. There is no allegation that she said anything else. Certainly no reasonable person would consider Ison's comment threatening or believe that she was considering taking some adverse action because of employees having engaged in protected concerted activity.

Bardwell had suggested a peer review survey for managers. In an email shortly thereafter, Ison had thanked Bardwell for his efforts. (GC Exh. 9.) However, the University rejected his idea, and he was somewhat upset with that rejection and showed it by his reaction towards Ison, who was the messenger. She subsequently told him that he had acted disrespectfully towards her. That was the end of the matter. There is no reason to make a "Federal case" out of this. No threats were made or implied to take any adverse action against Bardwell. There is no unfair labor practice here. Accordingly, I recommend to the Board that complaint paragraph 4(h)(1) and (2) be dismissed.

Complaint paragraph 4(i)(1) and (2) alleges that in late May or early June 2010, Rhonda Pigati interrogated employees about their concerted activities, and orally promulgated an overly-broad and discriminatory rule prohibiting its employees from discussing their terms and conditions of employment with each other. Pigati was a human resource manager and admitted supervisor.

She testified that as part of her job duties she had listened to the complaints of a number of counselors from the grad team, and in the second week of June 2010, she held a number of private one on one meetings in her office with some members of the grad team to discuss the concerns raised by team counselors. Pigati acknowledged that prior to questioning each counselor she did not inform them that their participation was voluntary, or that there would be no reprisals for refusing to cooperate. While Pigati testified that she did not inform the counselors specifically regarding the purpose for the meetings, it is apparent from the employee interview notes that she took, that Pigati wanted to get the employees' evaluation of team supervisor Ellen Rosa and of her leadership abilities, as well as to determine the level of team morale. (GC Exhs. 32–37.)

According to Gloria Johnson, when she first sat down for the meeting with Pigati, she was told by Pigati that Pigati "was meeting with everyone on the team and that whatever we talked about in that office, to keep it confidential." Pigati proceeded to ask Johnson what she thought about Ellen Rosa as a manager. Johnson indicated that Rosa was trying her best, but had not been given "a fair chance to even learn, you know, be a manager," and that Johnson "thought that [Rosa] was doing her best…with what she had." Further, Johnson volunteered to Pigati that "some of the other people had come to me and complain[ed] about [Rosa] as a manager." Pigati asked who these people were, and Johnson mentioned "Minal and Ed Bardwell…and Becca Garrett." According to Johnson, Pigati took notes on her computer documenting Johnson's answers. Johnson also testified that as she was leaving the interview, Pigati reiterated that she "will be contacting everybody else and just keep this, you know, don't talk to anybody else on the team." It is important to note, that Johnson did not indicate that she felt uneasy, frightened, or apprehensive in meeting with Pigati and answering her questions.

I do not believe that Pigati's questioning of Johnson constituted unlawful interrogation. While Pigati did not specifically tell Johnson the purpose for the meeting, it should have been immediately obvious to her that the intent of the meeting was to let management know what kind of a job Rosa was doing as a supervisor. While Rosa was Johnson's immediate supervisor, Pigati was a human resource manager, and did not directly supervise Johnson. The meeting was apparently rather routine, nonconfrontational, and with no tension or animosity. Plus, Johnson had volunteered to Pigati that other counselors had come to Johnson and complained about Rosa. It was only then that Pigati asked for the names of those counselors. Johnson appeared to have no reluctance in giving those names to Pigati, and there was no reason to believe that Pigati wanted the names for any nefarious purpose. Pigati was simply trying to determine how the employees felt about Rosa as a manager.

Under these particular circumstances, I do not find that Pigati's questioning of Johnson constituted unlawful interrogation. Rossmore House, supra; Westwood Health Care Center, supra. Accordingly, I shall recommend to the Board that the allegation in complaint paragraph 4(i)(1) be dismissed.

Regarding Pigati's admonitions to Johnson that she not talk with the other team members about the substance of their meeting, I have already found that such requests to keep confidential matters talked about with management, involving employees' wages, hours, and working conditions, are unlawful, without a legitimate business justification. In this instance, the Respondent has not offered any justification supporting a requirement that employees not discuss such matters with each other. Pigati's oral prohibition constitutes an unlawful restraint on the rights of employees to engage in Section 7 activity. Johnson had the right, had she chosen to do so, to have conversations with other counselors about management's apparent concerns over Rosa's supervisory performance. These matters involve employee working conditions, and the Respondent cannot lawfully restrict such basic protected concerted activity. *Lutheran Heritage Village-Livonia*, supra; *Double Eagle Hotel & Casino*, supra; *Flamingo Hilton Laughlin*, supra; *Phoenix Transit Systems*, supra.

Accordingly, I find that the Respondent, through Pigati's oral statements, has unlawfully promulgated a rule prohibiting employees from discussing their terms and conditions of employment in violation of Section 8(a)(1) of the Act, as alleged in paragraph 4(i)(2) of the complaint.

The General Counsel alleges in complaint paragraph 4(j)(1) and (2) that in July 2010, the Respondent, through Chanelle Ison, threatened employees with unspecified reprisals and informed them that they were disrespectful, all because they had

engaged in concerted activities. In his posthearing brief, counsel for the General Counsel indicates that this allegation is related to a meeting that Ison had with the grad team in July and an argument that she had with Bardwell at that meeting.

As I noted earlier, Ison and Nicolette Boessling, director of enrollment, met with the grad team in July 2010. During the meeting, Ison gave the team the bad news that the quotas could not be changed, and that they would not be able to get additional degree programs to supplement the existing ones they had in criminal justice and Christian studies. Also during the meeting, Ison informed the team of a new scheduling policy where one or two members of the team would need to cover late night shift hours every evening during the week. Some members of the team indicated their opposition to working any late shifts at all, but Ison stated that if team members did not volunteer for such shifts, then the shifts would simply be assigned. Johnson suggested a modified night shift system, whereby the team members could split up the night shifts, so that no team member would need to work the night shift more than 2–3 days a week. However, Ison denied this suggestion out of hand.

Apparently the discussion became somewhat heated. Bardwell, who had indicated along with several other employees that they were unable to work the night shift, voiced his displeasure with Ison's adamant refusal to allow the team from trying to split up the schedules. He said, "Why can't we do that if this is our meeting and we're getting the shift covered. Why can't we do that?" According to Bardwell, "We went back and forth and everyone looked at me and her. Me and Chanelle [Ison] went back and forth and we just kind of diffused it a little bit. And, she made the final decision that we could not do that." While Bardwell testified that he was the "most vocal" of the enrollment counselors about not being able to work a night shift, he admits that others "did voice their opinions as well." Although he testified that he could not recall specifically which counselors were vocal at the meeting, he acknowledged that, "Everyone, you know, started chiming in. So it was a barrage of individuals that went back and forth." Ison did not testify at length about the meeting, but did say that Bardwell was being "loud and inappropriate."

According to Bardwell, later that day he spoke with Nicolette Boessling privately. He told her that despite being very vocal at the meeting, "My intentions were all good. They were not anything beyond that." Boessling said, "Okay, no problem." However, I do think that it is revealing that Bardwell felt it necessary to explain his motives and actions to Boessling, perhaps because he himself thought that he had crossed the line of proper work place decorum.

Bardwell also went to Ison's office and met with her privately. He testified that he told her that he did not want her "to get the wrong impression," and that his "intentions were good." Once again, I think that it is revealing that Bardwell felt it necessary, on his own volition, to seek out a supervisor to explain his actions and demeanor at the just concluded meeting.

According to Bardwell, he mentioned the suggestion that the team members split up the night shifts, and that he felt as long as they got the shifts covered, that should be adequate. However, he claims that Ison said that she thought he had acted "a little disrespectful because this is the second time it's happened." Bardwell replied that, "I'm not trying to be disrespectful or anything. I'm just here to let you know that I'm not trying to do anything beyond being a good person and being a good employee." He testified that before his meeting with Ison ended, she mentioned that the grad team was "the most opinionated team, kind of like a hard case or a hard chip." He says that was the end of the conversation.

Ison's impression of the meeting was a little different. She testified that when Bardwell came into her office, "he was still pretty upset." He closed the door, and "he was really loud and he was really frustrated." She said that "this was not uncommon for Ed to be very vocal . . . he has a booming voice . . . especially when he's passionate about something . . . and it's not an uncommon conversation for Ed and I to have to say whoa, this is a little bit disrespectful." Ison further testified that "[Ed] would always say I have a loud voice… I don't mean it to be disrespectful." She testified that she "sincerely believes that Ed did not mean to come across that way, which is why [she has] never disciplined him for that." In any event, according to Ison, "The whole conversation ended up being just fine, and even ended up in Ed apologizing if he came across as being disrespectful."

It should be noted that when he testified, Ray Akers mentioned an incident, for which he did not give a date, when Bardwell was in Ison's office, and her administrative assistant was concerned about the loud voices in Ison's office and asked Akers to stand by Ison's door. He testified that he "stood by the door in case Chanelle [Ison] or someone needed help." The implication being that this incident was the same one that both Bardwell and Ison testified about. In any event, Akers' intervention was not needed.

Counsel for the General Counsel argues in his brief that the situation at hand is analogous to those involving an employer making statements that equate union activity or concerted activity with disloyalty to the employer. Some such cases have found implicit threats of repercussions for union loyalty, as opposed to company loyalty. However, I do not believe the matter before me is analogous to those situations and, therefore, I do not believe the cited cases are on point.[25]

I do not believe that the statements made by Ison that Bardwell had exhibited disrespect for her or that the grad team was opinionated were intended to be a reflection on Bardwell's or other team members' protected concerted activity. There is no question that the various members of the grad team had for an extended period of time complained amongst themselves and to a myriad of supervisors, including Ison, about their unhappiness with the quality of their leads, the quotas they needed to meet, and related matters. These were terms and conditions of

[25] *Rock Valley Trucking Co.,* 350 NLRB 69 fn. 6 (2007) ("It is well settled that an employer's reference to an employee's 'attitude' can be a disguised reference to the employee's protected concerted activity."); *Boddy Construction Co.,* 338 NLRB 1083 (2003) ("[E]mployer complaints about 'bad attitude' are often euphemisms for prounion sentiments, particularly where there is no alternative explanation for the perceived 'attitude' problems.") (citing *James Julian, Inc. of Delaware*, 325 NLRB 1109 (1998)).

employment, and certainly the various grad team members were engaged in protected concerted activity when they complained about such matters. Efforts were made by Ison and several enrollment counselor mangers to address those complaints and explain management's decisions, even though the complaints remained largely unremedied.

There was no credible evidence that Ison harbored any animosity towards the grad team because its members were vocal and active in registering their complaints. Certainly Ison's description of the grad team as opinionated was accurate, and would have come as no surprise to anyone who was familiar with the issue of poor quality leads and other complaints that the grad team had made. I do not think that it is a pejorative to refer to the grad team as "opinionated" or even as a "hard case," and I do not believe that it is a euphemism for disloyal or that it constitutes an implied threat of some unspecified reprisal.

Further, there is no contention that Bardwell was told that his conduct at the meeting was disrespectful until he initiated contact and approached Ison in her office in an obvious attempt to apologize. When agitated or upset, which Bardwell clearly was with the prospect of having to work a late shift, he apparently tended to get animated and loud. This had happened before, and Ison testified that she understood that Bardwell did not intend to be disrespectful, even though there was the appearance of such. Further, she credibly testified that she did not intend to take any adverse employment action against him for this conduct, because she understood his intent was not improper. The meeting was held in July 2010 and there was no adverse employment action taken against Bardwell until his termination in September of 2010. I will have much more to say regarding his termination later in this decision, but at this point it is sufficient to say that I do not find that termination was based in whole or in part on Ison's statement that Bardwell had been disrespectful.

Accordingly, based on the above, I shall recommend to the Board that the allegations in complaint paragraph 4(j)(1) and (2) be dismissed.

C. Protected Concerted Activity

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Employees are engaged in protected concerted activities when they act in concert with other employees to improve their working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14 (1962). An employer may not retaliate against an employee for exercising the right to engage in protected concerted activity. *Triangle Electric Co.,* 335 NLRB 1037, 1038 (2001); *Meyers Industries*, 268 NLRB 493, 479 (1984). An employer violates Section 8(a)(1) of the Act when it discharges an employee, or takes some other adverse employment action against him, for engaging in protected concerted activity. *Rinke Pontiac Co*., 216 NLRB 239, 241, 242 (1975).

The Board, with court approval, has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries, Inc.,* 281 NLRB 882 (1986), affirmed 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); See *Mushroom Transportation Co, v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) (observing that "a conversation may constitute a concerted activity although it involves only a speaker and a listener" if "it was engaged in with the object of initiating or inducing or preparing for group action or…it had some relation to group action in the interest of employees") See also *NLRB v. City Disposal Systems, Inc*., 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

In the matter before me, there can be no doubt that enrollment counselors Edmond Bardwell, Shelly Campbell, and Gloria Johnson all engaged in protected concerted activities. As members of the grad team, they frequently discussed among themselves and with other members of the team their concerns and complaints about the quality of leads they were receiving, about the lack of sufficient degree programs in which to enroll students, about unreasonable quotas, and other subjects. They also brought such complaints directly to the attention of management when they complained over the course of time to supervisors Chanelle Ison, Ray Akers, Ellen Rosa, Helen Schnell, and others. Further, based on the evidence, it is reasonable to conclude that management knew that all the members of the grad team shared these concerns. However, some members of the team were certainly more vocal than others, and it is now time to consider the activities and conduct of the three Charging Parties.

D. The Termination of Shelly Campbell

Shelly Campbell began her employment at Grand Canyon University on April 7, 2008, and she remained employed there until her termination on February 23, 2010. She testified that during her employment, "the workload had basically tripled from initially when we first started," and that "the leads that we were getting for prospective students were terrible." She also testified that, "The quotas that we were held to were unattainable, even if you were a top performer as I was." The entire grad team, according to Campbell, was "always voicing that to management because we were only able to enroll in select programs." Further, the three Charging Parties identified each other as the most vocal members of the grad team in raising these complaints with management. While the Respondent does not deny that Campbell, Johnson, and Bardwell were engaged in protected concerted activity when they raised complaints with management, it argues that such activity had nothing to do with their discharges. Of course, the General Counsel contends that Campbell was not terminated for any work related deficiencies, but, rather, because she engaged in protected concerted activity. Accordingly, it is necessary for me to determine the Respondent's true motivation in discharging Campbell.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging

violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's Wright Line test was approved by the United States Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has made a prima facie showing that Campbell's protected concerted activity was a motivating factor in the Respondent's decision to terminate her. In *Tracker Marine,* 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in Wright Line. Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. However, more recently the Board has stated that, "Board cases typically do not include [the fourth element] as an independent element." *Wal-Mart Stores, Inc*., 352 NLRB 815 fn. 5 (2008) (citing *Gelita USA, Inc*., 352 NLRB 406, 407 fn. 2 (2008)); *SFO Good-Nite Inn, L.L.C.,* 352 NLRB 268, 269 (2008); also see *Praxair Distribution, Inc*., 357 NLRB No. 91 fn. 2 (2011). In any event, to rebut the presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc*., 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros. Co*., 303 NLRB 638, 659 (1991).

It is axiomatic that Section 7 of the Act gives employees the right to communicate with each other regarding their wages, hours, and working conditions. Further, the Board has consistently held that communication between employees "for nonorganizational protected activities are entitled to the same protection and privileges as organizational activities." *Phoenix Transit Systems*, 337 NLRB 510 (2002) (citing *Container Corporation of America*, 244 NLRB 318, 322 (1979)).

As I have already found, there is no doubt that Campbell was engaged in protected concerted activity. She had numerous discussions with fellow grad team members, including Bardwell and Johnson, regarding their various complaints. A number of these discussions took place in the presence of the grad team enrollment counselor manager. Managers were aware of these complaints and several of them promised to try and improve the situation by furnishing the team with better leads. However, as it turned out, none of the managers were successful in improving the quality of the leads, lowering the enrollment quota, or adding more degree programs to those available for the grad team counselors to enroll students.

The many conversations that Campbell had with fellow employees and with managers regarding working conditions, beyond question constituted protected activity. See *Champion Home Builders Co*., 343 NLRB 671, 680 (2004). Further, there is no doubt that enrollment counselor managers Helen Schnell and Ellen Rosa were aware of that activity. Additionally, I do not accept the Respondent's defense that the ultimate decision maker for the discharges of the three Charging Parties, senior vice president of operations, Sarah Boeder, was personally unaware of the concerted activity engaged in by Campbell, Bardwell, and Johnson. It is well established Board law that information known to lower level managers, such as Schnell and Rosa, is presumed also known to upper management. Schnell and Rosa were admitted supervisors of the Respondent and their knowledge is considered to be imputed to and possessed by the Respondent as an institution. In my opinion, the Respondent's knowledge that Campbell, as with all the grad team members, made numerous complaints regarding her working conductions, and, thus, engaged in protected concerted activities, cannot be seriously denied.

Obviously, the discharge of Campbell constituted an adverse employment action. But, was the discharge retaliation for her concerted activities? As is reflected in the fact section of this decision, the Respondent had numerous reasons for terminating Campbell. In evidence is the termination request for Campbell that lists the basis for her termination, and had been approved by, among others, Supervisors Ellen Rosa, Chris Landauer, Chanelle Ison, Linda Lair, and Sarah Boeder. (GC Exh. 7.) According to Boeder's testimony, the decision was not based on a single instance of inappropriate conduct, but, rather, by a pattern of misconduct.

According to Campbell, not every item listed on her termination request form was discussed with her at the termination interview, which she had with Ellen Rosa and Linda Lair on February 23, 2010. However, one of the items that was discussed with her was her having forwarded on January 20, 2010, to a fellow grad team member and to a student, an email that she had received from a fellow employee sarcastically criticizing a change in the University's policy regarding leads for international students. This was a subject of concern to the grad team members who objected at having to transfer to other teams those leads for international students. The subject clearly involved the terms and conditions of employment of the grad team members, as the loss of leads could adversely affect the members' ability to make their enrollment quotas.

Earlier in this decision, I credited Campbell's testimony that at her termination interview when the matter of her forwarding this sarcastic email was discussed, Rosa told her that "[counselors are] not allowed to ever send out non-business related emails." I found this statement to be untrue, as employees frequently used the University's email system for personal communication, of which practice the Respondent was well aware. In making the statement attributed to her, Rosa was disparately enforcing and reaffirming the Respondent's Electronic Com-

munications Policy, because Campbell had engaged in concerted activity, which I found to constitute a violation of Section 8(a)(1) of the Act.[26]

Thus, I believe that the General Counsel has offered sufficient evidence to meet his burden of establishing that Campbell's discharge was in part retaliation for her protected concerted activity in forwarding an email to a fellow counselor that criticized the University's policy on the transfer of leads for international students. I believe that this was a "motivating factor" in the Respondent's decision to fire her.

Having found that the General Counsel has established a prima facie case that the Respondent was motivated to discharge Campbell, at least in part, because of her protected concerted activity, the burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizen Coordinating Counsel of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc*., 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

As noted earlier, the decision to terminate Campbell was ultimately made by Sarah Boeder, senior vice-president of operations. She testified that this decision was not based on a single instance of inappropriate conduct, but, rather by a pattern of misconduct. Over the course of her employment, Campbell had been reprimanded, counseled, retrained, and issued a number of disciplinary warnings as are reflected in her Termination Request form of February 16, 2010. (GC Exh. 7.) However, according to her testimony, Boeder was particularly troubled by Campbell's "bad call" to a prospective student in December of 2009 as recorded by the Quality Assurance Department, and the February 2010 incident involving improper assistance given to student Donnell Miller. Based on the nature of these two incidents, I believe that Boeder's testimony is credible. It is reasonable to conclude that the University considered these matters much more serious than Campbell's abuse of the Respondent's email system, only one instance of which had any connection with protected activity.

Boeder, along with the University's CEO, Brain Mueller, had actually heard the recorded call between Campbell and a prospective student as part of their review of the newly established Quality Assurance Department in early December 2009. After listening to the call, Mueller was very upset about some of the things that Campbell had said to the prospective student. According to Boeder, Muller said that, "This is exactly what we don't want happening. This is a perfect, perfect example of one of those things that if a regulatory agency heard this, this would jeopardize the University. It puts us at a huge risk." Muller then instructed Boeder to meet with Campbell and her manager regarding this call.

In the fact section of this decision, I set forth in detail the meeting with Boeder, enrollment counselor manager Schnell, and Campbell on December 16, 2009, where the recorded phone conversation between Campbell and the prospective student was discussed. Serious violations of the Respondent's policies and procedures were uncovered, which were ultimately listed as bullet points in a December 30, 2009 Employee counseling statement that Campbell received. They included: "Misrepresentation of the University's Academic Scholarship; Speaking to the student about Pell [Grants] and eligible amount; Indication that the student would incur no out-of-pocket costs; Leading the student to believe that the program would take only 2 years to complete without reviewing transcripts; Communicating to the student that the program is accelerated; Misquoting the cost per credit hour; Citing the University had 'beat Harvard and Yale' to be recognized for online excellence; Communicating to the student that there are no tests in the online programs; Guaranteeing employment; [and] Indicating salary amount that could be expected upon completion of the program." (GC Exh. 6.)

While Boeder apparently considered Campbell's misrepresentation of the University's policies and procedures severe enough to warrant termination, she testified that she personally made the decision not to terminate Campbell based on the December 2 telephone call alone, mainly because of the concern that the regulatory issues were more widespread. Because of this concern and Campbell's statement in defense of her conduct that the other enrollment counselors in her area were engaging in the same infractions, Boeder instructed Quality Assurance to investigate other enrollment counselors' calls in the specific area of the building where Campbell made her daily calls. Based on that investigation, Boeder testified that they did not find any calls that were "even close" to the egregious call that Campbell had made on December 2. Boeder's testimony was unrebutted.

The second incident that Boeder testified led her to decided to terminate Campbell occurred on February 9, 2010, when Campbell sent an email to student Donnell Miller that gave her instructions for accessing a weekly homework assignment. (GC Exh. 17, and R. Exh. 1, Bates Stamp 0518.) I discussed this incident earlier in this decision. Essentially, Campbell was attempting to aid a student that she had earlier enrolled who was having difficulty logging onto her online account. The student, Miller, need to do so in order to access her weekly homework assignment. Initially unsuccessful at getting the technical problem resolved, Campbell decided to email the student with a link and instructions for accessing the assignment. However, the University considers a student's ability to access assignments and navigate the online program to be a part of the student's academic training. It has a very strict policy against assisting a student academically.

Campbell testified that before sending Miller the email with the link and instructions, she obtained approval to do so from her manager Ellen Rosa. However, Rosa denied doing so. Rosa's testimony is supported by Erin Hernandez, enrollment manager, and Chris Landauer, assistant director of enrollment. Landauer considered Campbell's action a violation of the University's compliance policy. He alerted the University's compliance officer, Heyward Howell, who then investigated the incident. (R. Exh. 1, Bates Stamp 0519–0520.) Also, Chanelle Ison, associate vice-president, testified that any enrollment

[26] See complaint par. 4(k).

counselor who sent a homework assignment link to a student, as Campbell had done, would be "disciplined," and if there were "multiple infractions . . . would be terminated."

Based on the weight of the evidence, I am of the view that Campbell did not seek permission from her manager prior to assisting Miller. The evidence strongly supports the Respondent's contention that such assistance constitutes a violation of its compliance policy, in which its managers were all well versed.

I believe that Boeder testified credibly when she indicated that her decision to terminate Campbell was based on Campbell's "pattern of conduct," of which the two most egregious incidents were the "bad call" to the prospective student, and the improper assistance given to student Miller in violation of the University's compliance policy. It is significant to note that the incident where Campbell had engaged in protected activity by forwarding an email critical of the Respondent's policy regarding leads for international students, and for which she was reprimanded, had occurred on January 20, 2010. Yet, she was not fired for that incident. In fact, she was not terminated until after the incident on February 9, 2020, when she improperly assisted Miller. Apparently, this was the proverbial "straw" (event) that "broke the camel's back," and resulted in her discharge on February 23, 2010.

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that Campbell was terminated for cause. As such, the Respondent has rebutted the General Counsel's prima facie case and shown that it would have discharged Campbell even in the absence of her having engaged in protected concerted activity. Therefore, I shall recommend to the Board that complaint paragraph 4(l) be dismissed. Concomitantly, I conclude that the Respondent did not terminate Campbell because she violated its Electronic Communications Policy, and, therefore, I shall recommend to the Board that complaint paragraph 4(p) also be dismissed.

E. The Termination of Edmond Bardwell

Edmond Bardwell began his employment at Grand Canyon University on January 3, 2006, and continued his employment until terminated on September 2, 2010. During some of that period he was employed as an enrollment counselor and at other times as an inside sales representative. Further, he has testified that while employed in either of these two classifications, he was during certain times allowed to function in a "dual role," which permitted him to also perform outside sales representative duties. He also claims that for a period of time he actually held the classification of outside sales representative.

As in the case of Campbell, Johnson, and other grad team enrollment counselors, Bardwell had engaged in protected concerted activity. He registered the same complaints with management that they all did regarding poor quality leads, quotas, inadequate degree programs in which to enroll students, and other issues. However, it is important for the undersigned to note that in reviewing the evidence in this case, I did not find that the Respondent was engaged in any sort of an organized or coordinated campaign to "stamp out" or eliminate concerted activity among its employees. While certain isolated actions may have been taken by individual supervisors in retaliation for concerted activity, I find that such conduct by the Respondent was restricted to individual employees. I conclude that any actions taken against Campbell, Bardwell, and Johnson were restricted to them individually. Each of their cases must stand or fall on its individual merit.

In addition to the concerted activity engaged in by Campbell, Johnson, and other counselors, Bardwell had some additional activity worthy of mention. On approximately April 14, 2010, Chanelle Ison had a meeting with the grad team members, in part to discuss their complaints regarding poor quality leads and other matters. It was during this meeting that Bardwell proposed the idea for a "peer review" by the enrollment counselors for their managers. Ison initially liked the idea and asked Bardwell to produce some sort of questionnaire. He prepared such a form and gave it to Ison for review. However, subsequently, higher management rejected the idea, and when, at another grad team meeting with Ison, she told him so, Bardwell did not take the news well. Bardwell voiced his displeasure with the decision, stating that if implemented it would have improved employee morale. In any event, after the meeting, Ison approached Bardwell and told him that he had spoken to her in a disrespectful way. He said that he had not intended to be disrespectful, but thought that the meeting was intended as an open forum where employees could express their feelings freely. No adverse employment action was taken against Bardwell. While the General Counsel has alleged Ison's reference to Bardwell's behavior and comments at the meeting as being disrespectful to constitute an unfair labor practice, I found that not to be so. My reasons for so finding are set forth in detail above.

A second instance of concerted activity worthy of mention occurred in mid-July of 2010, when Ison held another meeting with the grad team. During the meeting, Ison informed the team members of a new scheduling policy that required one or two enrollment counselors to cover late night shift hours every evening during the week. The team members were not happy with this news, or with Ison's response to their suggestions on how the new policy might be adjusted to limit its impact on the employees. Apparently one of the most vocal employees in criticizing the policy was Bardwell, who did testify that other employees spoke as well, although perhaps not as vociferously as he did.

Following this meeting, Bardwell went to see Nicolette Boessling, director of enrollment and an admitted supervisor, who had also been present. He essentially apologized for his behavior at the meeting, saying that, "My intentions were all good. They were not anything beyond that." According to Bardwell, Boessling replied, "Okay, no problem."

Next, Bardwell went to see Ison and, again, essentially apologized for his behavior. He told her that he did not want her "to get the wrong impression," and that his "intentions were good." Ison said that she thought he had acted "a little disrespectful because this is the second time it's happened." Bardwell replied that, "I'm not trying to be disrespectful or anything. I'm just here to let you know that I'm not trying to do anything beyond being a good person and being a good em-

ployee." According to Bardwell, before the meeting ended, Ison mentioned that the grad team was "the most opinionated team, kind of like a hard case or a hard chip."

Ison testified about the incident much the way that Bardwell did, except she mentioned several times that Bardwell speaks in a loud booming voice, and that he was still rather upset with her when he came to see her after the meeting. Bardwell acknowledged during the hearing that when he gets excited, he does tend to be rather loud and animated. Ison testified that this was just his manner, and that while it made him seem disrespectful, that she understood that he did not intend to be so. According to Ison, Bardwell apologized before the conversation ended. No disciplinary action of any kind was taken against Bardwell for this incident.

It should be noted that Ray Akers, enrollment manager, testified that while Bardwell was in Ison's office, her assistant asked him to stand by the door just in case he was needed, as the voices coming from that office were rather loud. In any event, his involvement was not needed.

As discussed in detail above, the General Counsel alleges that the comments made by Ison to Bardwell in her office constitute an unfair labor practice. However, for the reasons that I stated in detail earlier, I found them not to be so.

Other examples of Bardwell's potential concerted activity include his having filed several charges against the University with the Arizona Attorney General's Office, Civil Rights Division and with the U.S. Equal Employment Opportunity Commission (GC Exh. 46, February 10, 2009, and GC Exh. 48, March 8, 2010.) These charges allege employment discrimination on the basis of race (Bardwell is an African-American) and religion (Christian). While somewhat confusing, it appears that both charges are currently still pending. (GC Exh. 47 & 49.) Also, the General Counsel alleges in complaint paragraph 4(q) that the Respondent violated Section 8(a)(4) of the Act by discharging Bardwell because on March 8, 2010, he filed his first charge with the Board in Case 28–CA–22938, and gave testimony to the Board in that case.

Before discussing Bardwell's termination, his employment status must be considered. He began working at the University as an enrollment counselor for the College of Business and Liberal Arts. After 6 months, he was promoted to the position of inside sales representative. However, he claims to have had a "dual role" that included certain outside sales representative duties. In that capacity, he claims to have traveled to various states outside of Arizona on behalf of the University. After approximately 8 months, he was transferred back to the position of enrollment counselor where he continued until August 2008, when he was promoted to outside sales representative. At approximately that time, he made a business proposal to the University regarding the Christian studies department. He testified that this proposal was acted upon favorably, as a result of which he was permitted to solicit for leads directly at churches and church conventions.

Regina Madden testified that during part of the time that Bardwell was soliciting at churches, she was his enrollment manager. She confirms that as an outside sales representative his duties included establishing partnerships with churches in order to solicit student leads. However, at some point Jacob Mayhew, director of enrollment, informed her that Bardwell's position was going to be changed since his work with the churches was not benefitting the University. He was going to be transferred back to the position of an inside enrollment counselor. Shortly thereafter at a meeting with Bardwell, Madden, and Mayhew, Bardwell was, according to Madden, informed by Mayhew that he had 30 days to wrap up his relationship with the churches that he had been working with, after which he was expected to return to the job of an enrollment counselor.

Bardwell admits that he was transferred back to his old position as an enrollment counselor. However, he claims that he still had authority to work with churches, if the opportunity presented itself. He claims that Mayhew told Madden "to give [Bardwell] some liberty to go to meetings outside the normal online, sitting in a cubicle." Further, he understood that this "dual role" was open ended with no sunset date. However, as noted, Madden disagrees, contending that Mayhew's instructions to Bardwell were clear, that he must relinquish his direct church solicitation duties and return full time to the position of an enrollment counselor.

As proof of Madden's testimony, counsel for the Respondent offered into evidence a type written document entitled "Team Madden, Internet Business Enrollment" setting forth Bardwell's duties and responsibilities as an enrollment counselor. Under the heading "Additional Clarification for Ed Bardwell" it states: "As an Internet Enrollment Counselor, you should have no further direct contact, on behalf of GCU, with any of the churches or church entities that you may have already contacted or would be contacting in your previous role as a OSR [outside sales representative]." Next to this language is written in pen the statement "5 churches for 30 days." Also written in pen is the date "July 1." This language would seem to support Madden's testimony that Bardwell was to relinquish all contacts with the church organizations on behalf of the University within the next 30 days, meaning June 1 to July 1. The document has a printed date at the bottom of the first page of May 19, 2009, and has a place for Bardwell's signature. However, the copy in evidence is unsigned. (R. Exh. 12.) While Madden testified that she saw Bardwell sign the document, Bardwell testified to the contrary that he did not recall any such document.

It is further worth noting that this document, also under the heading "Additional Clarification for Ed Bardwell," contains certain language, which seems to suggest that the University did not totally trust Bardwell and was determined to place him under close supervision so far as any outside activities in which he might try and involve the University. This language reads as follows: "Any future pursuit of other opportunities within GCU, whether they be additional job responsibilities, different job duties, or a change altogether, will need to be pursued with complete transparency, and in keeping with GCU's standard hiring practices which, among other things, requires approval by your manager on an Internal Application." (R. Exh. 12.)

Regarding Bardwell's termination, I conclude that under Wright Line, supra, and its progeny, that the General Counsel has made a prima facie showing that his protected concerted

activity was a motivating factor in the Respondent's decision to fire him. There is no doubt that Bardwell engaged in significant concerted activity, complaining over an extended period of time to both fellow employees and to management regarding poor quality leads, too few degree programs in which to enroll students, unrealistic quotas, and other matters of concern to the grad team members. Further, some of Bardwell's most vocal and heated discussions with management over issues of concern to the grad team occurred reasonably close in time to the date of his termination. The Board has frequently considered close proximity in time between concerted activity and termination to constitute sufficient evidence of a nexus between those events. See *Davey Roofing, Inc*., 341 NLRB 222, 223 (2004).

It was at a meeting with the grad team and Chanelle Ison in either late April or early May 2010, that Bardwell voiced his displeasure with management's decision not to institute a system of peer review for the enrollment counselor managers that he had previously suggested. This was followed by another meeting in mid-July 2010 with Ison and the grad team where Bardwell again expressed his strong displeasure, this time with management's new policy of requiring several members of the team to cover late night shift hours every night of the week. As I mentioned above, both incidents resulted in Ison telling Bardwell that she felt he had spoken to her in a disrespectful manner. Subsequently, Bardwell was terminated on September 2, 2010, approximately 6 weeks after he last vocally expressed displeasure to Ison.

Counsel for the General Counsel has established a presumption that the Respondent's termination of Bardwell was based, at least in part, on his protected concerted activity. See *Tracker Marine*, supra; *Wal-Mart Stores,* supra; Gelita USA, supra; SFO Good-Nite Inn, supra; also see *Praxair Distribution*, supra. However, in my view, the Respondent has rebutted that presumption by showing that its termination of Bardwell would have taken place even in the absence of his protected conduct. *Manno Electric*, supra; *Farmer Bros.,* supra.

Bardwell was terminated as a result of the events surrounding his enrollment of Reverend Gary Dean of Texarkana, Texas. While it is unclear exactly when the communication between these two men began, the earliest correspondence in the record is an email from Dean to Bardwell dated February 25, 2010, with Dean's attached college transcript. Although not expressed in the email, it is clear from its content that there were earlier communications wherein Dean had indicated an interest in pursuing a graduate degree in Christian studies. In this email Dean makes mention of 5–6 potential students from his church that would "like to see more about your programs." Further he says, "Pastor is very interested in a school at our church and would like to know what the requirements are?" (GC Exh. 24.)

Bardwell testified that in an earlier telephone conversation, Dean had expressed an interest in attending Grand Canyon University for a Christian studies graduate degree, and had also raised the issue of the University establishing a satellite campus at his church. While not entirely clear, Bardwell seems to testify that his reputation as established by previously working with various churches was what led Dean to contact him and raise the issue of a satellite campus.

At this point it should be noted that various officials with the University testified that it is a very difficult, laborious, time consuming process in order to establish a "satellite campus" of the University, especially one located outside the State of Arizona. The process involves various University boards, certifying educational institutions, and in the case of an out of state campus, permission is required of the State where the satellite campus is to be located. In fact, the process is so difficult that the Respondent has only one satellite campus located outside the State of Arizona, and that campus is located in Albuquerque, New Mexico.[27]

Bardwell's testimony that he had the authority to speak at churches and before church groups regarding student enrollment at the University was simply not credible. He may well have had such authority when he was classified as an outside sales representative. However, any such authority ended on July 1, 2009, pursuant to the "Team Madden, Internet Business Enrollment" document that he had signed under the "Additional Clarification for Ed Bardwell" language. (R. Exh. 12.) I find the testimony of enrollment counselor Regina Madden credible that Jacob Mayhew, the director of enrollment, had made it clear to Bardwell that he was losing this authority and was reverting back exclusively to the position of enrollment counselor. It is clear from her testimony that Mayhew was concerned with Bardwell's outside activities, which he did not feel were beneficial to the University. So there would be no misunderstandings on Bardwell's part, he was orally informed of the new situation, and he was also required to sign a document to that effect. Bardwell was simply incredible when he testified that he retained "dual authority," and had never seen nor signed the document in question. It certainly strains credulity to believe that Madden, Mayhew, or other agents of the University manufactured the document in question merely to use at trial. The fact that an unsigned copy of the document was admitted into evidence, rather than a signed copy, is not dispositive and does not make me less inclined to accept the document as genuine.

Although being careful to testify that he never made Dean any explicit promise about the University's willingness to open a satellite campus at Dean's church in Texarkana, it is clear to the undersigned that Bardwell intentionally gave Dean the impression that if he registered for classes at the University, and if a significant number of other parishioners registered for classes, that it was likely a campus could be established.

After Dean enrolled in a masters' degree program in Christian studies, he and Bardwell communicated frequently, according to Bardwell, on an almost weekly basis. In the record is a copy of an email from Dean to Bardwell dated July 19, 2010. The subject line of the email is, "Off site campus." The email reads as follows: "Ed, when I started looking at GCU you and I had a conversation about the above subject. You told me that the best thing to do was to enroll me first then we would establish my satellite campus. That has not happened and I am start-

[27] The University does have a number of satellite campuses located within the State of Arizona, mostly for its nursing programs, where students are taught at the site of various health care facilities.

ing my third class. My church has voted to do this campus and to open a Christian home schooling academy. I need to talk to you as soon as possible. Please call my cell." Clearly Dean sounds like a man who believes that he may have been deceived by Bardwell, who promised more than he could deliver.

Bardwell's testimony that he "made no promises" to Dean regarding the establishment of a satellite campus, and that he never told Dean that he had the authority to establish one simply does not "ring true." During his testimony, Bardwell places all of the blame on Dean for the alleged misunderstanding. According to Bardwell, it was Dean who said that he "wanted to take those classes first so he could see what the program was about to enlighten the Christian experience through his coursework before he wanted to give it approval."

However, Bardwell does admit to telling Dean that he was attempting to do some "fact finding" to see whether it would make business sense to open a satellite campus at that particular church. He stated that he also told Dean that, "You need at least 30, even more students to have a satellite campus." He testified, "That information I [knew] because I was an outside sales representative." Of course, Bardwell was no longer an outside sales representative, having been stripped of that responsibility by Madden and Mayhew at the time that he signed the "Team Madden, Internet Business Enrollment" form. (R. Exh.12.) He had no authority whatsoever to perform "fact finding" regarding the establishment of a satellite campus.

It is important to note that Dean did not testify at the hearing. Counsel for the General Counsel never offered any explanation for failing to call him. Had Dean been in a position to support Bardwell's testimony, I would have expected counsel for the General Counsel to at least make an effort to call him. Since this was apparently not done, I must conclude that his testimony would not have been in support of Bardwell or helpful to the General Counsel's case. I will draw such an adverse inference. This constitutes further evidence that Dean felt deceived by Bardwell.

Bardwell spoke to Dean on multiple occasions between his receipt of the July 19 email and August 18. Bardwell claimed that he asked Dean a number of times whether Dean had 30 or more students to enroll, a number that Bardwell testified he had mentioned to Dean as the minimum number of enrollees necessary for Bardwell to be willing to raise the idea of a satellite campus with the University's "higher-ups." However, Dean was never able to indicate that he had such a number of students ready to enroll.

The record evidence indicates that the number 30 used by Bardwell had no basis in fact. University officials offered unrebutted testimony of the extreme difficulty in opening a satellite campus in another state. Further, no minimum number of students willing to enroll in a satellite campus was ever mentioned by them as a factor to be considered in deciding the feasibility of such a campus. It would seem that Bardwell's use of the number 30 was either a figment of his imagination, or his effort to give Dean a figure he assumed that Dean could never reach. If Dean could not provide 30 students willing to register, Bardwell would not be faced with the problem of having to tell Dean that he had been deceived, and that Bardwell had no authority to discuss opening a satellite campus in Texarkana.

On August 19, 2010, Bardwell and Dean had an email exchange in which Dean mentioned that there was "newspaper coverage for Grand and [we] are receiving calls daily. I need your help please." (GC Exh. 26, Bates Stamp 018.) Admitted into evidence were several pages from the "Texarkana Gazette," where under the heading "Church News" appeared the following: "Main Street Church . . . . The pastor is the Rev. Gary G. Dean Sr. They also offer American Christian Academy II, a home school program for grades K-12 and university classes via satellite from Grand Canyon University, call." (GC Exh. 27.) (Emphasis added by the undersigned.)

Bardwell testified that he had not been notified prior to Dean's August 19 email that a newspaper advertisement had been placed in a local Texarkana publication or that Dean was planning on doing so. According to Bardwell, in his telephone conversation with Dean on August 19, after receiving Dean's email with the mention of the "newspaper coverage," Bardwell informed Dean that since "[Dean] didn't have 30 students, so there's no way I would be able to even think about going to the higher-ups." This conversation, if it occurred, was not recorded, apparently because the call was not made using the University's phone system.

According to Bardwell, he had additional phone conversations with Dean following the August 19 email, but he is uncertain how many or when they occurred. Bardwell is very vague regarding these calls. While some of these conversations were made using the University's phone system, it is important to note that Bardwell admitted that some of the calls were also made using his personal cell phone. Such calls, of course, could not be recorded through the University's Quality Assurance System. He claimed that other enrollment counselors also occasionally used their personal cell phones to call students, and that the reason this was done was so that the parties felt "more freely comfortable." When asked by the undersigned why using the cell phone would make him feel more comfortable, he admitted that it was because management could not listen to the call, but also because "some students even want you to talk to them on the cell phone because they don't want the conversation recorded."

Bardwell appeared rather nervous and uncomfortable when testifying about his conversations with Dean on his cell phone, and why he used his own personal phone rather than the University's phone system. There is no question in my mind that he did so merely because he did not want his words recorded by the University. His reason was obvious. He did not want the University to learn that he had deceived Dean into registering for classes with a promise, which he had no authority to make, for the establishment of a satellite campus at Dean's church if Dean could register additional students. Bardwell's proposal to Dean was totally unrealistic. Not only did Bardwell lack the authority to make such proposals, but he knew how very difficult it was to establish an out of state satellite campus. This is why he needed to avoid having some of his conversations with Dean recorded, and why he used his personal cell phone. Bardwell's protestations to the contrary are simply not credible.

At some point, the University, through its Quality Assurance

System, became aware of some of these conversations between Bardwell and Dean, at least those that were recorded from the University's phone system. A phone conversation between Dean and Bardwell on August 20, 2010 (R. Exh. 10, Transcription of Voice Mail Message #1), and a conversation between Dean and Bardwell on August 30, 2010 (R. Exh. 11, Transcription of Voice Mail Message #3), were recorded, transcribed, and placed into evidence. They are described in detail in the fact section of this decision. However, suffice it to say that Dean continued to be concerned that despite his taking classes at the University, there was no corresponding movement on the establishment of a satellite campus. Bardwell continued to stress the need for 30 students to enroll with the University, and Dean indicated that while he only had about 18 names, he was continuing to work on getting 30 enrolled. Apparently, the conversation on August 30 was the last conversation between these two men.

Some time at the end of August or early September, Ray Akers, enrollment counselor manager, and Nicolette Boessling, conducted a "one-on-one review" where they "would just spot check different employees on the team." According to Akers, they would select a 24-hour period and randomly select three or four calls made during that period by the employee. During one particular spot check, they listened to one of Bardwell's conversations with Reverend Dean that included a discussion of potentially setting up a satellite campus. Akers defined the reaction of both of them as being "very surprised." Boessling told Akers that "she would take it from here."

Sarah Boeder, senior vice-president of online operations, testified that after reviewing two calls that Bardwell had with Dean on August 20 and 30, a decision was made to terminate Bardwell. Boeder was the ultimate decision maker, and decided on termination because: (1) Bardwell failed to follow the extensive process needed to establish a satellite campus, and (2) he had made numerous misstatements to Dean, even though all enrollment counselors, including Bardwell, had recently completed a compliance training program. Management felt that Bardwell had represented to Dean that he had the authority to set up a satellite campus and that doing so would be no problem, once Dean enrolled at the University, which he did. Boeder testified that Bardwell had absolutely no authority even to discuss the establishment of a satellite campus, let alone lead a prospective student to believe that a campus in Texas was a realistic possibility. According to Boeder, the process of establishing a satellite campus takes months, if not years, is very complicated and involves numerous individuals and approvals from various internal University offices and state agencies.

Near the end of the work day on September 2, 2010, Bardwell met with Rhonda Pigati and Chanelle Ison. According to Bardwell, Pigati informed him that he had been terminated for "setting up satellite campuses." He denied doing anything of the sort. Ison stated that they had listened to several phone conversations with Reverend Dean and determined that he had made promises that he had no authority to make. Bardwell defended himself, saying that he had merely given Dean "information to see if this was something we can even consider, and I was going to present to the higher ups, management, and business development to see."

The involuntary termination request for Bardwell was approved by Boeder. It gives a number of reasons for termination, including fraudulent activity; making misrepresentations about the Respondent's policies or admission requirements; lack of integrity or unethical behavior; conflict of interest; and compliance violations. (GC Exh. 3.) In reviewing the termination document and its attachments, it is fairly clear to the undersigned that the Respondent's managers believed from the two phone calls that were recorded and from the email communication between Dean and Bardwell, that Bardwell was using Dean's desire to have a satellite campus at his church as a way of getting Dean, and potentially other students, to enroll at the University. In the Respondent's view, Bardwell was misleading Dean into believing that Bardwell was likely to arrange for such a satellite campus, once enough students who were affiliated with the church enrolled with the University. It appeared from the correspondence that this was the reason that Dean enrolled, and it was fairly obvious that Dean was attempting to get others, perhaps as many as 30, to also enroll.

The University managers contend that Bardwell had absolutely no authority to establish such a satellite campus, or even to raise that issue with Dean. That was the Respondent's stated reason for terminating Bardwell. I reject Bardwell's contention that he had "dual authority" to investigate opportunities for the University to establish satellite campuses, that he made no promises to Dean, and that he did not mislead him into believing that if Dean enrolled in classes and got a significant number of other students to do so that a satellite campus might be established at his church. The credible probative evidence in the form of witness testimony, documentation, and transcriptions of phone conversations demonstrates otherwise. Bardwell's attempt to rationalize what occurred between him and Dean is not credible.

Accordingly, based on the above, I conclude that the Respondent has met its burden of proof and established by a preponderance of the evidence that Bardwell was terminated for cause. As such, the Respondent has rebutted the General Counsel's prima facie case and shown that it would have discharged Bardwell even in the absence of his having engaged in protected concerted activity. Therefore, I shall recommend to the Board that complaint paragraph 4(n) be dismissed. Concomitantly, I conclude that the Respondent did not terminate Bardwell because he filed an unfair labor practice charge and gave testimony to the Board in Case 28–CA–22938, and, therefore, I shall recommend that complaint paragraph 4(q) also be dismissed.

F. The Termination of Gloria Johnson

Gloria Johnson began her employment at Grand Canyon University on August 31, 2009, and remained employed there as an enrollment counselor until her termination on August 2, 2010. As a member of the grad team, she engaged in the same sort of protected concerted activity as the other members of the team, complaining to fellow employees and to management about poor quality leads, unrealistic quotas, too few degree programs in which to enroll students, and other concerns. While Johnson may not have been the most vocal of the members of

grad team, she credibly testified that she raised these concerns on a regular basis with her enrollment counselor managers, and also with Chanelle Ison at the meetings that Ison held with the grad team members in April and July 2010. In any event, the Respondent, as with Bardwell and Campbell, does not dispute the fact that Johnson also engaged in protected concerted activity.

As I indicated earlier, the meetings that Ison held with the grad team members became rather heated. The meeting held in July became especially acrimonious with all the grad team members upset that the University was implementing a new scheduling policy requiring some of them to cover late night shifts every night of the week. Johnson expressed her unhappiness with the new policy along with her coworkers. She also specifically proposed to Ison a modified night-shift policy, which Ison summarily rejected. Obviously, Ison was aware of the strongly held views of the grad team members, including Johnson, as she mentioned to Bardwell after the meeting that they were an opinionated group.

I conclude that under *Wright Line*, supra, and its progeny, that the General Counsel has made a prima facie showing that Johnson's protected concerted activity was a motivating factor in the Respondent's decision to fire her. As noted, there is no doubt that Johnson engaged in protected concerted activity along with her fellow team members, which activity was well known to the Respondent. Further, in mid-July 2010, only a mere 2 weeks before she was terminated, Ison had had a very heated and acrimonious meeting with the grad team, including Johnson. It is well established that timing may serve as evidence of a nexus where a termination occurs in close proximity to protected concerted activity. See *Davey Roofing, Inc*., supra.

Counsel for the General Counsel has established a presumption that the Respondent's termination of Johnson was based, at least in part, on her protected concerted activity. *Tracker Marine*, supra; *Wal-Mart Stores*, supra; *Gelita USA*, supra; *SFO Good-Nite Inn*, supra; also see Praxair Distribution, supra. To rebut such a presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc*., supra; *Farmer Bros.,* supra. The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co*., 310 NLRB 865, 871 (1993). However, I am of the view that the Respondent has failed to meet this burden. The Respondent's reason for terminating Johnson appears to be a pretext.

Johnson had been working on enrolling Bessie Miller, a lead who had indicated an interest in the Christian studies master's degree program. On July 15, 2010, at 7:38 am Miller called Johnson in order to find out whether Johnson had received her completed electronic application materials. Johnson had received the application. However, the transcript request form as originally filled out by Miller had "Other" in the space set aside for the applicant's "Name of College/University." Also, the space for the "Campus Attended" was left blank, and Miller had listed NC as the State. Miller had listed the dates attended and the degree earned.

Johnson briefly looked over the application and indicated to Miller that it looked complete, except "that she didn't put the school in her transcript request form." Miller responded that she was unable to find her former school in the "dropdown" menu on the transcript request form webpage. Johnson then instructed Miller to check the dropdown menu again, just to make sure that she was not mistaken. After Miller was unable to find it for a second time, Johnson told her, "What I can do is I'll talk to my manager to see if it's okay to write the school in because [you] signed everything." She then told Miller, "I want you to give me your permission on the phone because they record everything we say." Miller granted Johnson permission to write on her application both the name of the school that she had attended and its location,

Johnson testified that she then put Miller on hold and took the printed transcript request form over to Jacob Husband, a team lead for the grad team. She showed him the form and asked if it was "okay if I write the name of the school on here and the campus Bessie Miller attended because this school is not on the dropdown." Husband replied that he was not sure if the Office of Academic Records would accept the form with the written information, and instructed Johnson to speak to their enrollment counselor manager, Ray Akers.

Johnson testified that she immediately approached Akers at his desk, showed him Miller's transcript request form and asked him for permission to "write the name of the school and the campus that Bessie [Miller] attended on the transcript." It is important to mention that according to Johnson, at the point that she showed Akers the transcript request form, she had made no markings on the document. She testified that Akers asked her what she was "trying to do," and, after receiving an explanation that she just wanted to write the name of the school, campus attended, and specific state on the form, he told her that it "should be okay." However, Johnson noted that as she was walking away from Akers' desk he stopped her and asked her, "What is it you're doing again?" Johnson repeated everything that she wanted to do, and that she would not be changing anything else on the form, nor was she signing Miller's name. Hearing this information, Akers again granted permission. It should be noted, however, that when Akers testified, he did not recall having a second conversation with Johnson on this date regarding the form.

By the time Johnson had returned to her desk, Miller had hung up. Johnson called her back, leaving a message, which Miller returned immediately. During that conversation, which lasted roughly 5 minutes, Johnson told Miller that as her supervisor had given permission, she was going to write Miller's college's name, the campus attended, and the location on the form. Miller again indicated that was fine with her, and she gave Johnson the information that the college that she had attended was North Carolina College of Theology and that the location of the campus was Baltimore, Maryland. Johnson then apprised Miller that she would submit her application packet, including the transcript request form.

Akers testified that sometime after Johnson had approached him on the morning of July 15, but before July 16, he went to discuss the Bessie Miller situation with his manager, Mike Rasmussen. After his conversation with Rasmussen, Akers realized that neither of them had the ability to listen to the

phone conversation between Miller and Johnson, because Johnson was not officially on Akers' team as at the time Akers was only the "temporary manager" of the grad team. Therefore, Rasmussen suggested that Akers speak with Rhonda Pigati, who had the authority to listen to the recorded call.

According to Akers, as he was getting ready for work on July 16, "something stuck out to me about the form," and "it occurred to me that it was a different color ink, it was like a purple color on the page." Because he knew that faxes should not have different colors, he decided to approach Johnson again in order for her to recount the situation. He went to Johnson's desk that morning and asked if she could repeat what she had asked him the day before. Johnson reiterated what she had requested and Akers replied, "Okay, next time just go ahead, send it back to the student, have the student write it in and process it."

Rhonda Pigati, a human resources manager, testified that some time after July 15, 2010, Ray Akers approached her and discussed the interaction that he and Johnson had had regarding the Bessie Miller application. Akers told Pigati that he wanted to share with her "something that was on his mind" from his conversation with Johnson. Akers set out the specifics of the interaction that occurred between him and Johnson regarding Miller's transcript request. However, what is not clear to the undersigned is whether Akers told Pigati that when he first saw the transcript form it did or did not contain the handwritten notations.

In any event, Akers testified that he and Pigati then retrieved the phone calls that Johnson had made on the morning of July 15 and listened to them. According to Pigati, Akers admitted that after Johnson had shown him the transcript form and asked him if it was okay to send it on for processing with a handwritten correction, that he had told Johnson that he "didn't think the handwriting would be a problem." However, according to Pigati, Akers claimed that the next day when he spoke to Johnson again, and realized that what she had done was to write in the information on the form herself, he had told Johnson that, "You can't do this. You cannot change documents that students have provided in any way, shape, or form. They cannot be altered." Pigati testified that she told Akers that this was a very serious matter, as Johnson had altered a student's document, and it did not matter that Miller had given her permission for Johnson to do so.

Akers' testimony was difficult to comprehend. He appears to suggest, without definitively saying so, that he was confused when originally approached by Johnson with Miller's transcript request. He seems to be suggesting that he thought that Miller had made the handwritten notations on the form herself, not Johnson. He apparently thought that would not be a problem, and only realized that it was Johnson who had made the handwritten notations once he recalled the different color ink on the form. By the time that he testified, it was clear to him that Johnson had made the additions to the form, and, so, he understood that this was a violation of the University's "zero tolerance non-compliance policy."

I do not find Akers' story credible, as it is very inconsistent and illogical. He admits telling Johnson that it was okay for her to make the changes to Miller's transcript request, not once, but twice on July 15. Then he claims that the next day he "saw the light" and realized that the ink on the form was a different color, so Miller must not have made the changes herself, but rather Johnson had done so. Well, he apparently already knew that as of the previous day. I am of the view that Akers is merely trying to cover for himself. I believe that he told Johnson that she could make the changes, and then subsequently, when his superiors began to question his conduct and displayed an interest in terminating Johnson, Akers suddenly claimed that he was confused and really did not understand what Johnson was asking of him. Frankly, it seems to me like nonsense. This is not "rocket science" and there was no reason why Akers, a supervisor, would have been confused over this issue. I find Johnson much more credible. Her story made sense, it was logical, and she delivered her testimony in a calm, straight forward manner that left me with the feeling that it was truthful. Accordingly, I accept Johnson's version of these events.

On August 2, 2010, Johnson was asked to meet with Rhonda Pigati in her office. When Johnson arrived in the office, both Pigati and Akers were waiting for her. Pigati asked Johnson if she remembered the situation regarding Bessie Miller's application materials. Johnson replied that she did, and Pigati stated that Johnson was going to be terminated for writing on the transcript request form. Johnson then pointed to Akers and stated that, "He told me I could do it." Akers then responded that he "didn't understand what [Johnson was asking him]." Johnson testified that she was shocked and that she asked Pigati, "So you're telling me I'm being terminated for doing something that a manager said I could do?" According to Johnson, Pigati responded that Akers "didn't understand what [Johnson] had said." That essentially completed the meeting.

The involuntary termination request form for Johnson indicates the following: "On July 15, 2010 Gloria received an (sic) Transcript Request Form from a student in which, 'other' was entered under the Name of College/University. While speaking with the student over the phone on the same day, Gloria realized this area needed the name of a University so she told the student she would add this information (North Carolina College of Theology, Baltimore MD) to the form on the student's behalf. Although Gloria asked the student for permission to add this information, making any additions/changes to any student documents is a violation of GCU's Standards of Performance-'Falsification of any student paperwork and/or student signatures or posing as a student as part of internal or external communication.'" The final approval of the termination was by Nikki Mancuso and Sarah Boeder. Of course, it does not mention that Akers had given Johnson permission to make the changes on behalf of the student.

As counsel for the General Counsel points out in his brief, Johnson did not write down on Miller's form any information that was false; did not sign Miller's name to the form; and made the changes only after getting permission from Miller to do so; and after being told by her supervisor, Akers, that her changes to the form were acceptable. Of course, Akers claims he misunderstood what Johnson was asking, and that, in any event, the changes had already been made on the form when

Johnson approached him. However, I have credited Johnson, and concluded that the changes were made only after Akers gave his permission. I believe that Akers has testified untruthfully in an effort to disguise his "mistake," and to support his superiors in their desire to terminate Johnson.

While the Respondent claims that it has a zero tolerance policy concerning noncompliance issues, in this case changes made by Johnson to the student's transcript request form, I fail to see the seriousness of the alleged offense. The information that Johnson placed on the form was correct and was only done with Miller's permission. The information itself was simply rudimentary, the name of her University and the campus location, hardly anything sensitive, confidential, or private. In any event, Akers had given her his permission to make the changes.

In my view, the Respondent was manufacturing "something out of virtually nothing" in an effort to terminate Johnson. The Respondent's defense is a pretext, and it is, therefore, appropriate to infer that the Respondent's true motive was unlawful. *Williams Contracting, Inc*., 309 NLRB 433 fn. 2 (1992); *Limestone Apparel Corp.,* 255 NLRB 722 (1981), enfd., 705 F.2d 799 (6th Cir. 1982); and *Shattuck Denn Mining Corp*., *v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). I believe that the real motive behind the Respondent's conduct in terminating Johnson was in retaliation for her protected concerted activity. Approximately 2 weeks earlier she had been involved in a rather acrimonious meeting between the members of the grad team and Chanelle Ison. It was as a direct result of her participation in registering complaints with management at that meeting that she was terminated.

Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act by discharging Gloria Johnson on August 2, 2010, as alleged in complaint paragraphs 4(m) and (5).

CONCLUSIONS OF LAW

1. The Respondent, Grand Canyon Education, Inc., d/b/a Grand Canyon University, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Maintaining an overly-broad and discriminatory written rule in its employee counseling statement that requires employees to agree to the following: "Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with any other current or former employees of Grand Canyon University, it constituents, vendors, or contractors, without prior written notice to and approval from Human Resources;"

(b) Orally promulgating and maintaining an overly-broad and discriminatory rule prohibiting employees from talking to each other about their terms and conditions of employment, including counseling sessions;

(c) Interrogating employees about their involvement with emails criticizing the Respondent and its policies as they affect their terms and conditions of employment;

(d) Orally promulgating an overly-broad and discriminatory rule prohibiting employees from discussing their terms and conditions of employment with other persons, including fellow employees;

(e) Threatening employees with discharge and other unspecified reprisals because they engaged in protected concerted activities;

(f) Orally referencing a written rule in its Electronic Communications Policy that the Respondent is disparately enforcing in order to prohibit its employees' use of emails to engage in protected concerted activities; and

(g) Discharging its employee Gloria Johnson because she engaged in protected concerted activity.

3. The above unfair labor practices affect commerce with the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent discriminatorily discharged its employee Gloria Johnson, my recommended order requires the Respondent to offer her immediate reinstatement to her former position, displacing if necessary any replacements, or if her position no longer exists, to a substantially equivalent position, without loss of seniority and other privileges previously enjoyed. My recommended order further requires that the Respondent make Johnson whole for any loss of earnings, commissions, bonuses, and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

The recommended order further requires the Respondent to expunge from its records any reference to the discharge of Johnson, and to provide her with written notice of such expunction, and to inform her that the unlawful conduct will not be used as a basis for further personnel actions against her. *Sterling Sugars, Inc*., 261 NLRB 472 (1982). Further, the Respondent must not make reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against Johnson in any other way.

Also, having found that a provision in the Respondent's employee counseling statement, as referenced above, is overly-broad and discriminatory, the recommended order requires that the Respondent revise or rescind the unlawful language, and advise its employees in writing that said provision has been so revised or rescinded.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by

such means. *J. Picini Flooring*, 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[28]

ORDER

The Respondent, Grand Canyon Education, Inc., d/b/a Grand Canyon University, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing an overly-broad and discriminatory written rule in its employee counseling statement that requires employees to agree to the following: "Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with any other current or former employees of Grand Canyon University, its constituents, venders, or contractors, without prior written notice to and approval from Human Resources;"

(b) Orally promulgating, maintaining, or enforcing an overly-broad and discriminatory rule prohibiting employees from talking to each other about their terms and conditions of employment, including counseling sessions;

(c) Interrogating employees about their involvement with emails criticizing the Respondent and its policies as they affect their terms and conditions of employment;

(d) Orally promulgating, maintaining, or enforcing an overly-broad and discriminatory rule prohibiting employees from discussing their terms and conditions of employment with other persons, including fellow employees;

(e) Threatening its employees with discharge and other unspecified reprisals because they engaged in protected concerted activities;

(f) Orally referencing a written rule in its electronic communications policy that the Respondent is disparately enforcing in order to prohibit its employees' use of emails to engage in protected concerted activities;

(g) Discharging or otherwise discriminating against any of its employees because they engaged in protected concerted activities; and

(h) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of the Board's Order, revise or rescind the written rule in its Employee counseling statement that requires employees to agree "that this coaching & counseling statement is considered extremely confidential and [other than with management] may not be discussed with other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources;"

(b) Within 14 days of the Board's Order, offer Gloria Johnson full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed;

(c) Make Gloria Johnson whole for any loss of earnings, commissions, bonuses, and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision;

(d) Within 14 days of the Board's Order, remove from its files any reference to the unlawful discharge of Gloria Johnson, and inform her in writing that this has been done, and that her discharge will not be used against her as the basis of any future personnel actions, or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her;

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

(f) Within 14 days after service by the Region, post at its campus in Phoenix, Arizona, and its other locations, copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 8, 2009; and

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D.C. October 21, 2011

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

You have the right to join with your fellow employees in protected concerted activities. These activities include discussing working conditions among yourselves, forming a union, and making common complaints about your wages, hours, and other terms and conditions of employment, including complaints regarding the quality of leads given to enrollment counselors, quotas enrollment counselors must meet, and degree programs available in which to enroll students.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT maintain the following rule in our employee counseling statement, or any other rule that prohibits you from talking to each other or other persons about your wages, hours, and other terms and conditions of employment, including counseling and disciplinary matters:

> Although I understand that I may discuss this plan with my management team, I agree that this coaching & counseling statement is considered extremely confidential and may not be discussed with any other current or former employees of Grand Canyon University, its constituents, vendors, or contractors, without prior written notice to and approval from Human Resources.

WE WILL NOT tell you that you cannot talk to fellow employees about your terms and conditions of employment, including counseling or discipline that we issue to you or other employees.

WE WILL NOT threaten you with discharge and other unspecified reprisals if you engage in protected concerted activities, including discussing your wages, hours, and other terms and conditions of employment, by email or other means.

WE WILL NOT tell you that you cannot communicate with other persons, including fellow employees, about your terms and conditions of employment.

WE WILL NOT interrogate you about your communications with fellow employees, by email or other means, regarding your wages, hours, and working conditions, including discussions which are critical of our policies.

WE WILL NOT discharge you because you engaged in protected concerted activities, including by communicating with employees and others concerning wages, hours, and terms and conditions of employment by email, other means, or in meetings with managers or supervisors.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL revise or revoke the rules contained in our Employee counseling statement described above; and WE WILL furnish you with written notice that these rules have been rescinded, or furnish you with a revised document that does not contain these rules.

WE WILL within 14 days of the Board's Order, offer Gloria Johnson full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Gloria Johnson whole for any loss of earnings, wages, commissions, bonuses, and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, compounded on a daily basis.

WE WILL within 14 days from the date of the Board's Order, remove from our files any and all records of the discrimination against Gloria Johnson, and WE WILL within 3 days thereafter, notify Gloria Johnson in writing that we have taken this action, and that the material removed will not be used as a basis for any future personnel action against her or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against her.

GRAND CANYON EDUCATION, INC. D/B/A GRAND CANYON UNIVERSITY